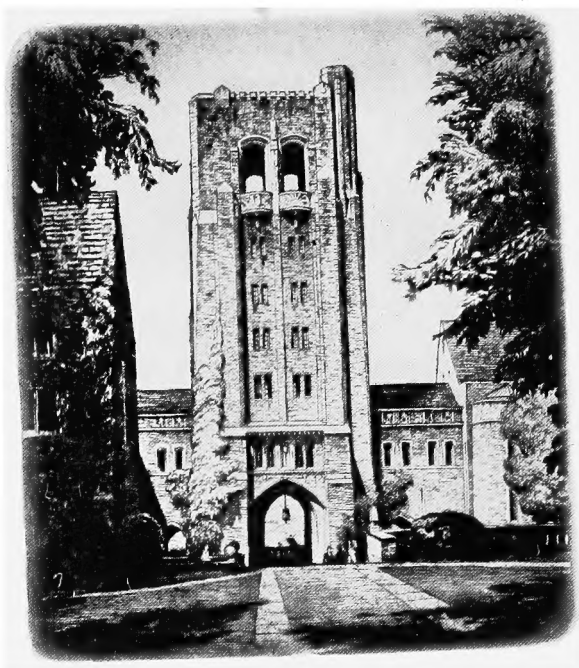


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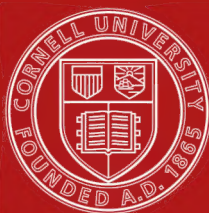
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A TREATISE
ON THE
LAW OF CARRIERS

AS
ADMINISTERED IN THE COURTS OF THE UNITED
STATES, CANADA AND ENGLAND

BY
ROBERT HUTCHINSON

THIRD EDITION

BY
J. SCOTT MATTHEWS
AND
WILLIAM F. DICKINSON
MEMBERS OF THE CHICAGO BAR

VOLUME II

CHICAGO
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THE LAW OF CARRIERS

CHAPTER VIII.

OF THE CARRIER'S DUTY AS TO THE TRANSPORTATION OF THE GOODS.

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Sec. 493. (§ 291.) In general.—Before we pass to a consideration of the manner in which the final act of the carrier in respect to the bailment, which consists in the delivery of the goods to the consignee, is to be performed, some other duties which grow out of his relation to them, and which have a more immediate connection with their transportation, claim attention. If we suppose the goods of various employers to have been received by him, and to be in his custody, awaiting transportation by him to their various destinations, questions may arise as to the order in which they shall be forwarded in case his means of conveyance are inadequate for an immediate shipment of them all; as to the time within which their transit must be commenced in order that their delivery may be made within the reasonable time within which the law requires it to be made; the mode of carriage and the manner in which the goods must be stowed or laden; and the degree of care and

attention which must be bestowed upon them in the event of the many accidents which may happen to them during the carrier's custody.

Sec. 494. (§ 291a.) General nature of carrier's duty.—"A carrier's duty," it is said,¹ "is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions which, in the exercise of due care, may be averted or counteracted. He must guard the goods from destruction or injury by the elements; from the effects of delays; indeed, from every source of injury which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated. Unknown causes, or those which are inherent in the nature of the goods and cannot be, in the exercise of diligence, averted, will not render the carrier liable. The nature of the goods must be considered in determining the carrier's duty. Some metals may be transported in open cars. Many articles of commerce, when transported, must be protected from rain, sunshine and heat, and must have cars fitted for their safe transportation. Live animals must have food and water when the distance of transportation demands it. Fruit and some other perishable articles must be carried with expedition and protection from frost. So the carrier must attend to the character of the goods he transports. He is informed thereof by inspection of the freight bills or by other papers accompanying the shipment."

Sec. 495. (§ 292.) His duty to provide sufficient means of conveyance.—The first duty of the common carrier, who holds himself out to the public as ready to engage in the carrying business, is of course to provide himself with reasonable facilities and appliances for the transportation of such goods as he holds himself out as ready to undertake to carry. He must put himself in a situation to be at least able to transport an amount of freight of the kind which he proposes to carry equal to that which may be ordinarily expected to seek transportation upon his route; for, while the law will sometimes excuse him for

1. Beck, J., in *Beard v. Railway Co.*, 79 Iowa, 518.

delay in the transportation, and even for a refusal to accept the goods which may be offered for carriage, when there occurs an unprecedented and unexpected press of business, it will not do so when his failure or refusal results from his not having provided himself with the means of present transportation for all who may apply in the regular and expected course of business.² He cannot discriminate in favor of the business of one station to the prejudice and injury of the business of another station of the same importance;³ nor can he discriminate in favor of one shipper although the demands for transportation facilities exceed his capacity or the anticipated or usual calls upon him.⁴ And if, owing to an unexpected influx of business, there results a temporary scarcity of such facilities, he will be entitled to apportion the same in an equitable manner among his patrons, having in mind their relative volume of business, facilities for loading, and the merchandise in sight.⁵

The law implies an agreement to furnish the necessary facilities for transportation on a particular day when a request has in due time been made by the shipper of a station agent, who, for that purpose, has the authority of a general agent.⁶ If for any cause the carrier is unable to furnish vehicles at the time he has agreed to do so, it becomes his duty to inform the shipper of such fact within a reasonable time; and if, in the absence of such notice, the shipper believes that the vehicles will be in readiness at the time named, and, relying upon the conduct of the carrier, he presents his goods at the time and place agreed upon, and there are no vehicles ready to receive

2. See *Texas, etc., R'y Co. v. State v. Railroad Co.*, — Neb. Barrow, (Tex. Civ. App.), 94 S. —, 99 N. W. Rep. 309. W. Rep. 176, citing this section; 6. Where the shipper requires a car at a certain station for his exclusive use, he must, at common law, give notice to the railroad company, after which notice the company has a reasonable time in which to furnish the car. *Railroad Co. v. Bundy*, 97 Ill. App. Hoffman, etc. Co. v. Railway Co., — Mo. App. —, 94 S. W. Rep. 597.

3. *Ayres v. Railway Co.*, 71 Wis. 372.

4. *Strough v. Railroad Co.*, 87 N. Y. Supp. 30, 92 App. Div. 584.

5. *State v. Railroad Co.*, — Neb. —, 101 N. W. Rep. 23; 202.

them, the carrier will be liable in damages if injury is caused by his neglect of such duty.⁷ But where the carrier has agreed to furnish vehicles on a particular day, a delivery at any hour of the day will be sufficient.⁸

Sec. 496. Same subject—Must inform shipper of necessary delay—Burden of proof.—But while the carrier cannot be excused if he has failed to provide himself with a sufficiency of conveyances and other means for the transportation of that which he may reasonably expect to be offered, he is not bound to provide in advance for extraordinary occasions nor for an unusual influx of business. But while an unusual press of business may justify his refusal to accept the goods which may be offered, if, having provided himself with reasonable facilities, he finds it impossible from previous engagements to commence its shipment according to the usual and regular course of his business, and he accepts the goods without notice to the shipper of the circumstances, and without obtaining his assent, either express or implied, he cannot be heard to say that his delay was caused by such a contingency. He must, at his peril, inform the shipper of the necessary delay, that the shipper may exercise his own discretion as to the propriety of making the shipment; and even though the delay may occur from such a cause upon a connecting route over which he has bound himself to carry the goods to destination, which may not be known to him at the time of their acceptance, he is liable for any un-

7. *Nichols v. Railroad Co.*, 24 Utah, 83, 66 Pac. Rep. 768, 91 Am. St. Rep. 778.

Where a shipper makes application for cars on a certain day, it is the duty of the carrier to advise him within a reasonable time if it will be unable to furnish them at that time; and if it fails to do so, and leads the shipper to rely on having the cars on that day, it will be liable to him in damages. *Ayres v. Railway Co.*, 71 Wis. 372.

And although the shipper is in-

formed that there are no cars in which to ship his live stock, and he permits the stock to remain in the carrier's pens to await the arrival of cars, the carrier will be liable for a shrinkage occasioned by a lack of food and water where he promises the shipper that the cars will arrive before the stock is in need of food and water. *Gulf, etc. R'y Co. v. House & Watkins*, — Tex. Civ. App. —, 88 S. W. Rep. 1110.

8. *McGrew v. Railway Co.*, 109 Mo. 582, 19 S. W. Rep. 53.

reasonable delay in the transportation, and such unavoidable difficulty, though wholly unknown and unanticipated, will not excuse him.⁹ The burden of proving that he could not in a particular instance furnish the cars needed without jeopardizing his other business, and with reasonable diligence, is upon the carrier.¹⁰

Sec. 497. (§ 293. Same subject—Must provide safe and suitable vehicles.—And not only must he provide himself with means sufficient to transact the business for which he has advertised and held himself out to the public as soliciting, but he must provide himself with means of transportation safe and suitable for his business in which he engages. No defect in any vehicles, or in any instrument used in the transportation of goods, can excuse the common carrier from his common-law liability to be answerable for the safety of the goods at all

9. The acceptance of the goods without notifying the shipper that they cannot, owing to extraordinary conditions prevailing upon the route, be promptly delivered is tantamount to an assurance that they will be delivered within a reasonable time. *Russell Grain Co. v. Railroad Co.*, — Mo. App. —, 89 S. W. Rep. 908; *Texas, etc. R'y Co. v. Kolp*, — Tex. Civ. App. —, 88 S. W. Rep. 417; *Palmer v. Railroad Co.*, 101 Cal. 187, 35 Pac. Rep. 630; *Railway Co. v. Edwards*, 78 Fed. 745, 24 C. C. A. 300; *Pittsburgh, etc. R'y Co. v. Racer*, 5 Ind. App. 209, 31 N. E. Rep. 853; *Railroad Co. v. Farmers', etc. Firm*, 107 Ky. 53, 52 S. W. Rep. 972; *State v. Railroad Co.*, — Neb. —, 99 N. W. Rep. 309; *Toledo, etc. R. R. v. Lockhart*, 71 Ill. 627; *The Great W. etc. R. R. v. Burns*, 60 *id.* 284; *Galena, etc., R. R. v. Rae*, 18 *id.* 488; *Wibert v. Railroad*, 12 N. Y. 245; *s. c.* 19 Barb. 36; *East Tenn. & Ga. R. R. v. Nelson*, 1 Cold. 273;

Carter v. Peck, 4 Sneed, 203; *Southern Ex. Co. v. Womack*, 1 Heisk. 256; *Place v. Union Ex. Co.*, 2 Hilton, 19; Ill. Cent. R. R. *v. Waters*, 41 Ill. 73; *Great W. R. R. v. Hawkins*, 18 Mich. 427; *Porcher v. Railroad*, 14 Rich. (Law), 181; *Sager v. Railroad*, 31 Me. 228; *Empire T. Co. v. Wamsutta Oil Co.*, 63 Penn. St. 14; *Condict v. Railroad*, 54 N. Y. 500; Ill. Cent. R. R. *v. Cobb*, 64 Ill. 128; Mich. Cent. R. R. *v. Burrows*, 33 Mich. 6; *Ayres v. Railway Co.*, 75 Wis. 215.

And where the delay arises through the carrier's inability to make delivery to a succeeding carrier, he must, if practicable, notify the shipper of such delay and not undertake to forward the goods by another route than that contemplated. *Fisher v. Railroad Co.*, 99 Me. 338, 59 Atl. Rep. 532, 105 Am. St. Rep. 283, 68 L. R. A. 290.

10. *Ayres v. Railway Co.*, 71 Wis. 372.

events, except when the loss may occur from the act of God or of the public enemy. He can guard himself against responsibility for loss or damage from such cause only by contract; and, as we have seen, if the accident which has occasioned such loss or damage can be traced to his negligence, not even his contract will be a protection to him except in those states in which he is allowed to contract for exemption from the consequences of his negligence; and not in them, unless such contract explicitly so provides. If he be a carrier by water, he must provide himself with a vessel tight and staunch and provided with all tackle and apparel of every kind which may be in use by those skilled in the business and which may promote the safety of the voyage. It is a part of the contract on the part of every owner of a vessel who holds himself out as a common carrier, that his ship is seaworthy.¹¹ This is implied by the law as the very foundation of his employment, and if any damage occurs to the goods by reason of its unseaworthiness, or because it is not provided with all the needed appliances for avoiding or escaping the danger, it will

11. "In every contract for the carriage of goods by sea," says Mr. Justice Gray, "unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence." *The Caledonia*, 43 Fed. Rep. 681, citing *Work v. Leathers*, 97 U. S. 379; *Cohn v. Davidson*, 2 Q. B. Div. 455; *The Glenfruin*, 10 Prob. Div. 103. See, also, *Bowring v. The baud*, 42 Fed. Rep. 794; *The Eugene Vesta*, 28 Fed. Rep. 762;

Sumner v. Caswell, 20 Fed. Rep. 249; *Crow v. Falk*, 8 Q. B. 467; *Valente v. Gibbs*, 6 C. B. (N. S.) 270; *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644, *affirming* 43 Fed. 681 and 50 Fed. 567.

See also sections on this subject under the Harter Act, *ante*, §§ 345-387.

A vessel may be unseaworthy as to a passenger's baggage. *The Kensington*, 183 U. S. 263, 46 L. Ed. 190, 22 Sup. Ct. R. 102, *reversing* 94 Fed. 885, 36 C. C. A. 533 and 88 Fed. 331. In *Upper-ton v. Steamship Co.*, (1903), 89 Law T. 289, 9 Com'l Cas. 50, the vessel was held unseaworthy as to a passenger's baggage because it was stowed in one of the lavatories.

be regarded as the consequence of the personal negligence of the owner, against which no contract will protect him. And if he be a carrier by lighter or barge, he must see that it is sufficiently strong to resist all external forces to which it may be subjected in the ordinary course of navigation, and, in considering its fitness for the voyage, the nature of the service which it is to perform and the dangers attending the navigation in which it is engaged are to be taken into consideration. These, as well as the condition of his vessel, and its fitness for the service, the carrier must know at his peril.¹² He must also provide his vessel with a competent master and with a good and sufficient crew.¹³ So if he be a carrier by land, it is clearly his duty to furnish vehicles which are safe and sufficient for the purpose intended;¹⁴ and if it fails in the performance of this duty and injuries therefrom ensue, the carrier will be liable unless with knowledge of the defect the shipper has assented to the use of the insufficient vehicle.¹⁵

Sec. 498. Same subject—Carrier not excused because defective vehicles used by him are owned by another.—The duty of the carrier to provide safe and suitable vehicles is the same whether the goods are carried in his own vehicles or in those of

12. *The Northern Belle*, 9 Wall. 526; *Lyon v. Mells*, 5 East, 428; *Propeller Niagara v. Cordes*, 21 How. 23; *Sharp v. Grey*, 9 Bing. 457; *Cam. & Am. R. R. v. Burke*, 13 Wend. 611. road Co. *v. Crews*, 53 Ill. App. 50; *Railway Co. v. Searles*, 71 Miss. 744, 16 So. Rep. 255, citing *Hutchinson on Carr*; *Jones v. Railroad Co.*, — Mo. App. —, 91 S. W. Rep. 158.

13. *Propeller Niagara v. Cordes*, *supra*; *Missouri Pac. Ry. Co. v. Kingsbury*, (Tex. Civ. App.) 25 S. W. 322, citing *Hutchinson on Carr*; *The Giles Loring*, 48 Fed. 463. 15. *Potts v. Railway Co.*, 17 Mo. App. 394; *Mason v. Railway Co.*, 25 Mo. App. 473; *Coupland v. Railroad Co.*, 61 Conn. 531, 23 Atl. Rep. 870, 15 L. R. A. 534; *Hoosier Stone Co. v. Railway Co.*, 131 Ind. 575, 31 N. E. Rep. 365; *Haynes v. Railroad Co.*, 54 Mo. App. 582.

14. *Sloan v. Railway Co.*, 58 Mo. 220; *Illinois Cent. R. Co. v. Hall*, 58 Ill. 410; *Railroad Co. v. Pratt*, 22 Wall. 123; *Hawkins v. Railway Co.*, 17 Mich. 62, 18 Mich. 427; *Railway Co. v. Fairbanks & Co.*, 90 Fed. 467, 33 C. C. A. 611; *Rail-* Mere knowledge of the defect does not amount to assent. *Potts v. Railway Co.*, *supra*; *Mason v. Railway Co.*, *supra*.

another, and he cannot escape responsibility for his failure to provide vehicles reasonably fit for the conveyance of the particular class of goods which he undertakes to carry by alleging that the vehicles used for the purpose of his own transit were the property of another.¹⁶ This would be true, for instance, where the defective vehicles were owned by a refrigerating or a fruit transportation company, and were furnished for a consideration to a railroad company. In such a case, the railroad company would be liable for all damages resulting from the use of the defective vehicles, although the ownership of the vehicles was in another. Nor can the carrier avoid responsibility as a carrier by devolving upon the shipper the duty of inspecting or selecting the vehicle in which his goods are to be carried,¹⁷ and a stipulation in the bill of lading that the shipper has examined the vehicle for himself and found it to be in good order, and has accepted it as "suitable and sufficient" for the purpose of his shipment will not discharge the carrier from liability for damages resulting from defects in the vehicle since the necessary effect of such a stipulation would be to release the carrier from liability for his own negligence in failing to provide a safe and suitable vehicle.¹⁸

Sec. 499. Same subject—Liability of initial carrier for defective vehicles provided by him.—Where the vehicle is furnished by an initial carrier for the transportation of goods to a point beyond his own line, and he negligently violates his duty by furnishing a vehicle which is defective, he will be liable for any subsequent damage arising from the defective condition of the vehicle, although such damage develops on the line of a connecting carrier.¹⁹ And this rule will remain true even though the initial carrier expressly confines his lia-

16. *Railway Co. v. Fairbanks & Co.*, 90 Fed. 467, 33 C. C. A. 611; 444, 49 L. R. A. 462, 81 Am. St. Rep. 722.

Mathis v. Railroad Co., 65 S. C. 271, 43 S. E. Rep. 684, 61 L. R. A. 624; *Railroad Co. v. Dies*, 91 Tenn. 177, 18 S. W. Rep. 266, 30 Am. St. Rep. 871; *Railroad Co. v. Cromwell*, 98 Va. 227, 35 S. E. Rep. 172.

17. *Railway Co. v. Fairbanks & Co.*, *supra*.

18. *Railroad Co. v. Dies*, *supra*.

19. *Railway Co. v. Marshall*, — Ark. —, 86 S. W. Rep. 802; *Railway Co. v. Searles*, 71 Miss. 744,

bility for damages to his own line.²⁰ Nor is the carrier exempted from liability by the fact that the shipper knew the vehicle to be defective and used it, or had entered into an express agreement with the carrier that the carrier should not be liable therefor.²¹

If the shipper contracts with the initial carrier for a special kind of vehicle to be used on the entire journey, and the connecting carrier for any reason refuses to receive it, as for instance, if it be too large for travel over his line, it is nevertheless the duty of the initial carrier to see that the best adapted vehicle that can reasonably be procured is obtained into which to transfer the goods, and that the vehicle is in a suitable condition to carry the goods with safety. And in so doing, he is bound to regard all the conditions of which he has notice, the season, the length of the journey accomplished and still ahead, the delay already experienced, the value of the goods—in a word to use proper care according to the circumstances.²²

Sec. 500. Same subject—Liability of connecting carrier for defective vehicles received by him from initial or another connecting carrier.—It is the duty of a connecting carrier as much as it is the duty of the initial carrier to provide vehicles which are reasonably fit for the conveyance of the particular kind of goods he accepts for transportation, and he will not be excused from this duty even though the goods are received and carried by him in a vehicle which belongs to the initial carrier or another connecting carrier. When once a connecting carrier accepts vehicles from a preceding carrier for the purpose of transporting them either to destination or to the line of another carrier, he adopts and makes them his own for the purpose of

16 So. Rep. 255; *Searles v. Railway Co.*, 69 Miss. 186, 13 So. Rep. 815; *Railroad Co. v. Wilkerson Bros.*, (Tex. Civ. App.) 82 S. W. Rep. 1069. *by v. Railroad Co.*, — Mich. —, 105 N. W. Rep. 769; *Jones v. Railroad Co.*, — Mo. App. —, 91 S. W. Rep. 158. See *post*, § 508.

20. *Railway Co. v. Strain*, 81 Ill. 504; *Railroad Co. v. O'Loughlin*, (Tex. Civ. App.) 84 S. W. Rep. 1104; *Railroad Co. v. Aten*, (Tex. Civ. App.) 81 S. W. Rep. 346; *Kib-* 21. *Railroad Co. v. Pratt*, 89 U. S. 123, 22 L. Ed. 827; *Railway Co. v. Marshall*, — Ark. —, 86 S. W. Rep. 802.

22. *Eckert v. Pennsylvania R. Co.*, 211 Pa. 267, 60 Atl. 781.

conveying the goods contained in them, and he will therefore be liable for any damages arising from their unfitness for the carriage of the goods.²³ It has been held, however, that where the carrier contracts for the shipment of live stock, and the contract contemplates that the cars containing the stock shall go through to destination in the condition they were in with respect to bedding, a connecting carrier does not, by accepting such cars, render itself responsible for damages arising from the cars not being properly furnished with bedding at the time the shipment was begun, since the negligence in such a case is that of the initial carrier alone.²⁴

Sec. 501. Vehicles must not only be safe and suitable, but must be inspected while in transit.—A common carrier is not only bound to provide vehicles at the commencement of the journey reasonably fit and sufficient for the conveyance of the goods which he undertakes to carry, but he must from time to time, as the good management of his road would seem to require it, inspect such vehicles while they are in transit. And the same duty of inspection in respect of vehicles received from a connecting carrier, and run over his own line, devolves upon him as in respect of those provided by himself; and if he fail to make such reasonable inspection he will be deemed guilty of such negligence as will render him liable for any resulting loss, although his contract would otherwise excuse him.²⁵

Sec. 502. Carrier, in the selection of vehicles, must guard against the exigencies of such weather as may reasonably be expected.—In the selection of vehicles for the transportation of the goods, it is the duty of the carrier to guard against the exigencies of such weather as may reasonably be expected at the particular season of the year and latitude in question.

23. *Shea v. Railway Co.*, 66 Minn. 102, 68 N. W. Rep. 608 (Perishable fruit); *Railway Co. v. Carlisle*, (Tex. Civ. App.) 78 S. W. Rep. 553 (Live stock); *Willingford v. Railroad Co.*, 26 S. Car. 258, 2 S. E. Rep. 19.
 24. *Railroad Co. v. O'Loughlin*, (Tex. Civ. App.) 84 S. W. Rep. 1104.
 25. *Ruppel v. Railway Co.*, 167 Pa. St. 166, 31 Atl. Rep. 478, 46 Am. St. Rep. 666.

Very cold weather in a latitude where such weather is at times experienced, and at a time of the year when such weather is likely to be experienced, cannot be termed a "stress of weather" within the meaning of an exemption in the bill of lading from liability for loss.²⁶

Sec. 503. (§ 294.) Duty as to providing appliances for preventing the escape of sparks.—Cases as to the sufficiency of the vehicles used by the carrier will, of course, more frequently occur in actions by their passengers against passenger carriers, for personal injuries sustained by them by reason of defects in the means used for their transportation, than in actions against common carriers of goods. But such questions may also arise and become of vital importance in reference to such defects in the instruments for the conveyance of goods used by the latter. If the carrier has protected himself by contract against liability for loss occasioned by certain accidents, it may become an important question whether, by his failure to provide himself with machinery and vehicles of the most improved modes of construction, and such contrivances as are in approved use for the prevention of such accidents, he has not subjected himself to the charge of negligence, and has not thereby lost the benefit of the exceptions to liability in his contract. This was the principal question in *Steinweg v. The Erie Railway*.²⁷ The railway company had provided in its bill of lading for exemption from liability for loss by fire. It was proven that the goods were destroyed by fire originating from a spark from the engine of the train on which they were loaded, and it was also proven by the plaintiff that there were appliances by which locomotives were made to consume their own sparks, which were not in use by the road, and that the failure of the road to provide itself with these appliances constituted negligence on its part, and deprived it of the benefit of the limitation to its liability in its bill of lading; and the rule of law was held to be, that the common carrier was guilty

26. *Cleveland, etc. Railway Co.* 27. 43 N. Y. 123.

v. Heath, 22 Ind. App. 47, 53 N. E. Rep. 198.

of negligence if it failed to adopt the most approved modes of construction and machinery in known use in the business, and the best precautions in known practical use for securing safety; and that if there was known, and in use, any apparatus which, when applied to an engine, would enable it to consume its own sparks and thus prevent them from igniting goods in the company's charge, it was negligent if it did not avail itself of such apparatus; but that it was not bound to use every possible prevention which the highest scientific skill might have suggested, nor to adopt an untried machine or mode of construction. And it was said that there must exist, not only the scientific power to make locomotives which would consume their own sparks, but such locomotives must have been made and put into practical use before a railway company could be charged with negligence in not putting them on its road.²⁸

The rule in such cases is that when the plaintiff has shown that the fire which has caused the damage originated from sparks escaping from the locomotive of the defendant, a *prima facie* case of negligence is established which may be rebutted by evidence showing that the locomotive was supplied with a spark arrester or other appliance for preventing the escape of sparks such as was approved and used by railroads generally, and that the locomotive was carefully and skillfully handled by the carrier's agents or employees.²⁹

Sec. 504. (§ 295.) Liability of carrier for using exposed cars.—In *Levering v. Union Transportation Company*,³⁰ where cotton, being carried by railroad under a bill of lading which provided that it was carried "at the owner's risk of fire," was destroyed by fire in the course of the transit in one of the company's cars, it was held that if the loss were attributable to its being in a car which was not safe and suitable to protect it against such an accident, the company was liable, notwith-

28. *Ford v. Railway Co.*, 2 Fos. & Fin. 730; *Hegeman v. Railroad*, 3 Ker. 9; *Field v. Railroad*, 32 N. Y. 339. *Association v. Loeb*, 1 Tex. Ct. Rep. 537, 59 S. W. Rep. 617, citing *Railway Co. v. Johnson*, 92 Tex. 591, 50 S. W. Rep. 563.

29. *Otis Co. v. Railway Co.*, 112 Mo. 622, 20 S. W. Rep. 676; *Fire* 30. 42 Mo. 88.

standing the exception in its bill of lading. And in *The New Jersey S. Co. v. Merchants' Bank*,³¹ one of the grounds upon which the carrier was denied the benefit of the exception against risks in his contract was, that he had not provided himself with a safe vessel, nor with the appliances for the extinguishment of fire which the law of congress required. So where merchandise was being carried in the same train with an exceedingly inflammable oil, which was set on fire by sparks from the locomotive, and owing to some defect in the coupling of the cars they could not be separated in time to prevent the burning of the car in which the merchandise was loaded, it was held that the defect in the coupling was negligence in the company, and that it was liable, notwithstanding its receipt provided that the shipper should take all risks of fire.³²

Sec. 505. (§ 295a.) Duty in respect to providing refrigerator or ventilated cars.—If the goods are of such a nature as to require for their protection some other kind of car than that required for ordinary goods, and cars adapted to the necessity are known and in customary use by carriers, it is the duty of the carrier where he accepts the goods to provide such cars for their carriage.³³ This rule, of course, would not

31. 6 How. 344. See the opinion of Woodbury, J.

32. *Empire T. Co. v. Wamsutta Oil Co.*, 63 Penn. St. 14.

33. *Beard v. Railway Co.*, 79 Iowa, 518. In this case a carrier received for transportation a quantity of butter to be shipped to New Orleans, and sent it forward in a common car without ice or other protection, whereby it was injured. In its opinion the court said: "In the case before us the marks on the package and the waybill disclosed that the subject of shipment was butter. The employees of defendant were endowed with intelligence which taught them that the season was summer, when warm weather prevailed; that but-

ter in common cars would be greatly injured by the ordinary heat of the climate; and that the butter, as it approached its destination, would be subject, by reason of the change of latitude, to greatly increased heat from the weather. All these things are familiarly known to all men. Surely, the law will presume that defendant's employees had full knowledge thereof. The law required the defendant, having received the perishable cargo involved in this suit, to exercise the care and diligence necessary to protect it; and, if improved cars for the transportation of articles of commerce liable to injury from heat were in use, it was defendant's duty to use

extend to compelling a carrier by wagon to equip his wagon with absolute safeguards against undue heat or cold, since "it would be unreasonable to measure the duty of an ordinary freighter in providing vehicles for the transportation of perishable property with that of a company contracting for transportation across the continent by rail."³⁴ But undoubtedly under modern methods in the case of carriers by rail, the rule would extend to proper refrigeration according to the established custom.³⁵ And the same would be true of modern ocean going vessels.³⁶

It is competent, of course, for the carrier and shipper to enter into a special contract designating the manner in which perishable property is to be carried, and if the carrier should

such cars in carrying the butter. . . . Having accepted the butter for transportation, defendant cannot escape liability for not safely transporting it on the ground that it did not have cars sufficient for the purpose."

"These views are supported," said the court, "by the following among other cases: *Hewett v. Railway Co.*, 63 Iowa, 611; *Sager v. Railroad Co.*, 31 Me. 228; *Hawkins v. Railway Co.*, 17 Mich. 62, 18 Mich. 427; *Railroad Co. v. Pratt*, 22 Wall. 123; *Wing v. Railway Co.*, 1 Hilt. 241; *Transportation Co. v. Cornforth*, 3 Col. 280. As to the duty of defendant to use cars so constructed and used as to avoid injury from heat, see *Boscowitz v. Express Co.*, 93 Ill. 525; *Steinweg v. Railway Co.*, 43 N. Y. 123."

So where a carrier accepted for transportation in winter time a quantity of delicate fruit, likely to be injured by freezing unless protected, and sent it on in a common box-car, whereby it was injured, when a refrigerator car

would have protected it, the carrier was held liable for not using the refrigerator car.

Merchants' Despatch Co. v. Cornforth, 3 Col. 280.

34. *Carr v. Schafer*, 15 Colo. 48, 24 Pac. Rep. 873.

35. *Johnson v. Railway Co.*, 133 Mich. 596, 95 N. W. Rep. 724, 10 Det. L. N. 324, 103 Am. St. Rep. 464; *Railroad Co. v. Cromwell*, 98 Va. 227, 35 S. E. Rep. 444, 49 L. R. A. 462, 81 Am. St. Rep. 722; *Popham v. Barnard*, 77 Mo. App. 619; *Udell v. Railroad Co.*, 13 Mo. App. 254. *But see Wetzell v. Railroad Co.*, 12 Mo. App. 599, and *Tucker v. Railroad Co.*, 33 N. Y. Supp. 93, 12 Misc. 117; *s. c.* 32 N. Y. Supp. 1, 11 Misc. 366, *reversing* 30 N. Y. Supp. 811, 10 Misc. 35. See also, as to ventilated cars, *Davenport v. Railroad Co.*, 173 Pa. St. 398, 34 Atl. 59 and *Giles v. Fargo*, 60 N. Y. Super. Ct. 117, 17 N. Y. Supp. 476.

36. *The Maori King v. Hughes*, (1895) 2 Q. B. 550, 65 L. J. Q. B. 168, *affirming* 64 L. J. Q. B. 744.

undertake to carry such property in cars specially adapted to preserve it, he would become responsible for any defects in the cars resulting in injury to the property.³⁷ And although the shipper may discover before the departure of a car that a special stipulation in the contract, such as that the car shall be iced and re-iced as often as necessary, has been insufficiently carried out by the carrier, he will not on that account assume any risk of loss where he has no opportunity of relieving the situation and he honestly believes the property will reach its destination in good order.³⁸

If the shipper undertakes to supply a refrigerator car with ice, the carrier has the right to assume, unless the facts are such as to put him on notice to the contrary, that the shipper has furnished a sufficient quantity of ice to keep the car cool until a delivery to the consignee can, in the ordinary course of business, be made. But the nature of the service in such a case also gives rise to an implication that the carrier will exercise a proper degree of care, where actual delivery has been delayed beyond the usual time, in protecting the property from injury by the heat.³⁹

Sec. 506. (§ 295b.) When carrier may use open or closed cars.—So it is the duty of the carrier to have and use such vehicles as are reasonably adapted to protect the goods from inclemencies of the weather and from loss by theft or otherwise. Certain classes of goods, for example, may properly be transported upon open cars; while to so transport goods liable to be injured by rain or snow or to be abstracted by thieves along the route might be gross negligence.

Under his common-law liability as an insurer, the duty of properly protecting the goods against such losses as these exists for his own protection, but even under contracts limiting his liability, the reasonable care which the law still de-

37. *Railroad Co. v. Davis*, 54 Ill. App. 130; *affirmed in* 159 Ill. 53, 42 N. E. Rep. 382, 50 Am. St. Rep. 143; *Perishable Freight Transportation Co. v. O'Neill*, 41 Ill. App. 423.

38. *Johnson v. Railway Co.*, 133 Mich. 596, 95 N. W. Rep. 724.

39. *Railway Co. v. Reyman*, — Ind. —, 73 N. E. Rep. 587.

mands will require proper attention to the subject of such protection.⁴⁰

Sec. 507. Bullion room on vessel for carriage of precious metals must be reasonably safe.—If gold or other precious metals are to be carried in a vessel, and it is in the contemplation of both parties to the contract that the gold is to be carried in a bullion room, there is an implied warranty that the bullion room in which the gold is stored is so constructed as to be reasonably fit to resist thieves.⁴¹

Sec. 508. How where shipper selects the vehicle himself.—As we have seen, the duty of furnishing suitable vehicles rests upon the carrier and not upon the shipper, and the failure to discharge this duty is negligence from the consequences of which the carrier is not permitted to free himself by a stipulation in the bill of lading which devolves upon the shipper the duty of selecting vehicles which are suitable. Such a stipulation is void as an attempt by the carrier to limit his liability against his own negligence in providing defective vehicles.⁴²

40. Sending cotton on open cars when fires are raging along the track is negligence. *Insurance Co. v. Railway Co.*, 3 McCrary, 233. It is not negligence to carry on an open car goods packed in a case too long for a box car if proper precautions are taken to protect them from the weather. *Burwell v. Railroad Co.*, 94 N. C. 451.

To carry oil in open cars whereby the barrels in which the oil was exposed to the sun and weather, and were destroyed in violation of a contract to carry in covered cars, was held to be such negligence as to estop the carrier from setting up his exemption in the bill of lading that "oil was carried at the owner's risk." *Railway Co. v. Fitzgerald* (Can.) 5 S. C. R. 204.

41. *Queensland & Nat. Bank v.*

Steam Nav. Co., (1898) 1 Q. B. 567, 67 Law J. Q. B. 402, 78 Law T. (N. S.) 67, 8 Asp. 338.

42. *Railway Co. v. Pratt*, 89 U. S. 123, 22 L. Ed. 827; *Railway Co. v. Marshall*, — Ark. —, 86 S. W. Rep. 802; *Railway Co. v. Harwell*, 91 Ala. 340, 8 So. Rep. 649; *Railroad Co. v. Davis*, 159 Ill. 53, 42 N. E. Rep. 382, 50 Am. St. Rep. 143; *Railroad Co. v. Holland*, 162 Ind. 406, 69 N. E. Rep. 138, 63 L. R. A. 948; *Railroad Co. v. Dies*, 91 Tenn. 177, 18 S. W. Rep. 266, 30 Am St. Rep. 871; *Railway Co. v. Fairbanks*, 90 Fed. 467, 33 C. A. 611.

"The individual, in a sense, is compelled to accept of whatever is offered him by the carrier and cannot refuse it without, perhaps, destroying his interests. It is the carrier's duty to furnish suitable cars for the transaction of his

But if the shipper freely and voluntarily chooses not to rely upon this absolute duty to furnish suitable vehicles, and takes upon himself for a sufficient consideration, in the form of a reduced rate or otherwise, the duty of selecting vehicles which are suitable for the goods he intends to have carried, he cannot hold the carrier liable for injuries arising from such patent defects as he ought to have discovered in his examination of the vehicles.⁴³ But as to those defects which are not such that an ordinary inspection by the shipper would bring them to his attention, and yet which are such that a reasonably careful inspection by a person experienced in such business would lead to their detection, an inspection and acceptance of the vehicle by the shipper will not save the carrier harmless from damages due to such defects unless it can be shown that they were actually pointed out to the shipper, and that he accepted

business, and he is liable for an injury resulting therefrom, notwithstanding the shipper is aware of the defect." *Paddock v. Railway Co.*, 60 Mo. App. 328.

43. *Frolich Glass Co. v. Railroad*, — Mich. —, 101 N. W. Rep. 223; *Williams v. Railway Co.*, 117 Ga. 830, 43 S. E. Rep. 980; *Railway Co. v. James*, 117 Ga. 832, 45 S. E. Rep. 223; *Ragsdale, Harper & Weathers v. Railway Co.*, 119 Ga. 627, 46 S. E. Rep. 832; *Densmore Commission Co. v. Railway Co.*, 101 Wis. 563, 77 N. W. Rep. 904.

Where a shipper ordered a car for stock too late for the carrier to get it to him on time with due diligence on its part, and the shipper thereupon elected to send the stock in a box car, the carrier was not liable for an injury to the stock shipped in such box car, when it was willing to furnish a stock car on the next day. *Huston v. Railroad Co.*, 63 Mo. App. 671.

If the shipper is present when

the cars are bedded, and accepts the same, expressing his satisfaction therewith, the carrier will not be liable for alleged failure to properly bed the cars. *Railroad v. O'Loughlin* (Tex. Civ. App.), 72 S. W. Rep. 610.

A selection of unsuitable cars by the consignor will be binding on the consignee. *Frolich Glass Co. v. Railroad Co.*, — Mich. —, 101 N. W. Rep. 223.

44. *Leonard v. Whitcomb*, 95 Wis. 646, 70 N. W. Rep. 817; *Railway Co. v. James*, 117 Ga. 832, 45 S. E. Rep. 223; *Railroad Co. v. Davis*, 159 Ill. 53, 42 N. E. Rep. 382, 50 Am. St. Rep. 143, *affirming* 54 Ill. App. 130; *Railroad Co. v. Holland*, 162 Ind. 406, 69 N. E. Rep. 138, 63 L. R. A. 948; *Hunt v. Nutt*, (Tex. Civ. App.) 27 S. W. Rep. 1031.

If the defect relates to the commodiousness of the car, and the possible effect of larger accommodations upon the particular animal to be carried, and the ques-

the vehicle with full knowledge of their existence.⁴⁴ The burden of proof in a case of actual selection by the shipper is on the shipper to prove that a defect was not patent when he examined the vehicle.⁴⁵

Sec. 509. Carrier's duty in furnishing cars for live stock.—

A common carrier who undertakes to transport live stock is bound to furnish cars reasonably safe for that purpose. This does not mean that he has fulfilled his duty in that respect when he has supplied cars that will merely hold or confine the stock while being carried, but that such cars shall be reasonably safe for transporting stock without injury from any causes that should be reasonably anticipated, considering the usual and ordinary propensities of the stock. It is to be expected that where animals are confined together in a car they are apt to crowd against the sides and, if horses or mules, it is not unusual for them to both kick and crowd. What would be a safe car for carrying one class of stock might not be for stock of another class. The carrier, therefore, in providing such cars, must see to it that they are constructed reasonably safe and sufficient to prevent injury, having in mind the ordinary habits of the animals delivered to him for transportation.⁴⁶ But he is not bound to anticipate and pro-

tion is discussed between the shipper and the carrier who informs the shipper that a more commodious car will be furnished if the shipper is willing to pay a larger rate of freight, and such larger rate is not unreasonable, and the shipper decides to take the cheaper car, and he himself attempts to guard against the want of room, it may be assumed from such facts that the shipper assumes the risks incident to such want of room. *Coupland v. Railroad Co.*, 61 Conn. 531, 23 Atl. Rep. 870, 15 L. R. A. 534.

45. *Williams v. Railway Co.*, 117 Ga. 830, 43 S. E. Rep. 980.

46. *Betts v. Railway Co.*, 92

Iowa, 343, 60 N. W. Rep. 623, 26 L. R. A. 248, 54 Am. St. Rep. 558; *Leonard v. Whitcomb*, 95 Wis. 646, 70 N. W. Rep. 817.

The carrier is liable for a defective door. *Root v. Railroad Co.*, 83 Hun, 111, 31 N. Y. Supp. 357, s. c. 76 Hun, 23, 27 N. Y. Supp. 611.

The carrier is liable for defective slats. *Railway Co. v. Rainey*, 19 Colo. 225, 34 Pac. Rep. 986. But not when car is actually selected by shipper. *Williams v. Railway Co.*, 117 Ga. 830, 43 S. E. Rep. 980.

The carrier is liable if the sides of a car are so constructed that a slight kick from a horse or mule

vide for animals that may be extraordinarily unruly and vicious.⁴⁷

If the carrier furnishes cars which are affected with any contagious disease, the shipper may recover such damages as he sustains.⁴⁸ But if the shipper contracts to provide stalls, and the stalls furnished by him prove insufficient,⁴⁹ or if he contracts to furnish bedding, and the bedding furnished is defective,⁵⁰ he cannot recover damages from the carrier for consequent injuries to the animals.

Sec. 510. (§ 295d.) Same subject—Stational facilities—Cattle-yards.—The duty of the carrier extends also to the providing of proper and reasonable stational facilities, such as platforms, warehouses, approaches, and the like.⁵¹ And in the case of a carrier of live stock, it includes the furnishing of proper yards, pens, gates and other appliances necessary to enable the stock to be received, loaded, unloaded, and delivered to the consignee.⁵² In providing pens at any point, how-

would break them. *Betts v. Railway Co.*, *supra*.

The carrier is liable for defective bedding. *Railroad Co. v. O'Loughlin*, (Tex. Civ. App.) 84 S. W. Rep. 1104.

47. *Selby v. Railroad Co.*, 113 N. C. 588, 18 S. E. Rep. 88, 37 Am. St. Rep. 635.

48. *Railroad Co. v. Harris*, 184 Ill. 57, 56 N. E. Rep. 316, 48 L. R. A. 175, *affirming* 84 Ill. App. 462; *Bradford v. Railway Co.*, 64 Mo. App. 475.

49. *New England, etc. Steamship Co. v. Paige*, 108 Ga. 296, 33 S. E. Rep. 969.

50. *Gilleland & Dillingham v. Railroad Co.*, 119 Ga. 789, 47 S. E. Rep. 336.

51. *Mason v. Railway Co.*, 25 Mo. App. 473. See also *post*, in the case of passenger carriers, § 928 *et seq*.

This duty is imposed by stat-

ute in Texas. *Railway Co. v. Trammel*, 28 Tex. Civ. App. 312, 68 S. W. Rep. 716.

The failure of a carrier to keep an agent or employe at a "country or plantation switch" for the purpose of receiving or guarding freight, or to keep fire apparatus there is not negligence when such switch is maintained merely for the convenience of planters who are thereby saved the expense of carting their cotton some miles to a regular station and where the risk seems to have been accepted as a consideration for the convenience afforded. *Charnock v. Railway Co.*, 194 U. S. 432, 24 Sup. Ct. R. 671, *affirming* 113 Fed. 92, 51 C. C. A. 78.

52. *Covington Stock Yards v. Keith*, 139 U. S. 128; *McCullough v. Railway Co.*, 34 Mo. App. 23; *Lackland v. Railway Co.*, 101 Mo. App. 420, 74 S. W. Rep. 505; *Chinn*

ever, the carrier is only required to anticipate and make reasonable provision for the volume of live stock business which he ordinarily and usually transacts at such point.⁵³ It is also his duty to keep the pens so furnished by him in a suitable condition for the purpose for which they are intended.⁵⁴ Thus if he should permit the pens to become so out of repair that the live stock placed within them break out and are injured, he will be liable to the shipper for such injury.⁵⁵ And where lambs were placed in stock pens, and the carrier negligently permitted salt water to flow into the pens, the carrier was held liable in damages for injuries resulting from the lambs drinking the salt water, although such injuries did not develop until after the lambs had passed into the possession of a connecting carrier.⁵⁶

v. Railway Co., 100 Mo. App. 576, 75 S. W. Rep. 375; *Railway Co. v. Farnbrough*, (Tex. Civ. App.) 55 S. W. Rep. 188; *Railway Co. v. Trammel*, 28 Tex. Civ. App. 312, 68 S. W. Rep. 716.

Irrespective of a contract limiting liability in the carriage of live stock if the owner of the stock undertakes to unload it at such a time that the carrier or its servants may have no notice of what he is doing, and the stock is injured by breaking through a chute that is old and rotten and was selected by the shipper himself, the carrier having no knowledge of its intended use, no recovery may be had against the carrier. *Candee v. Railroad*, 73 Conn. 667, 49 Atl. Rep. 17.

Under a contract for the transportation and delivery of live stock, providing that live animals will only be taken at owner's risk of injury "during the course of transportation, loading and unloading," unless otherwise special-

ly agreed, the carrier is bound to unload the animals although at owner's risk. The custom of the carrier's agent at destination to require the consignee or owner to unload live-stock, although known to the owner, cannot affect the contract. *Benson v. Gray*, 154 Mass. 391, 28 N. E. Rep. 275, 13 L. R. A. 262.

53. *Casey v. Railway Co.*, (Tex. Civ. App.) 83 S. W. Rep. 20.

54. *Texas, etc. Ry. Co. v. Felker*, — Tex. Civ. App. —, 90 S. W. Rep. 530; *Railway Co. v. Dunman*, (Tex. Civ. App.) 81 S. W. Rep. 789.

Whether the pens were suitable is a question of fact for the jury. *Lackland v. Railway Co.*, 101 Mo. App. 420, 74 S. W. Rep. 505.

55. *Cooke v. Railroad Co.*, 57 Mo. App. 471; *Tracy v. Railroad Co.*, 80 Mo. App. 389.

56. *Railroad Co. v. Harman*, 91 Va. 601, 22 S. E. Rep. 490, 44 L. R. A. 289, 50 Am. St. Rep. 855.

Sec. 511. (§ 296.) Duty of carrier to accept goods for carriage.—Being provided with the facilities for the transportation of goods of the character which he proposes to carry, and to which his means of conveyance are adapted, the carrier is under a legal obligation to receive all such goods as may be offered to him for carriage, provided they are offered at such place as he may appoint, or at which freight is customarily delivered to and accepted by him, unless, as we have seen, an unusual influx of business has made their present transportation impossible, or, as it is sometimes expressed, unless his coach be full; or unless they are offered at an unreasonable time, or at a time unreasonably long before that fixed for his departure; or the property by such delivery would be exposed to danger; or be of a dangerous character, or the carrier has reason so to believe, and the shipper refuses to disclose their true character;⁵⁷ or where, either from the condition of the goods themselves, or the manner in which they are packed or otherwise protected or secured, they are in an unfit state to bear the necessary transportation.

Sec. 512. (§ 297.) He must carry for all alike and cannot show preferences.—In all such exceptional cases, the carrier may refuse, if he will, to accept; and the law will excuse him for so doing.⁵⁸ But if he refuse, without some legal reason for so doing, to accept for carriage the goods, being such as he is accustomed to carry, of any person who is ready and willing to pay him his price for the carriage, he becomes liable to an action for damages for so doing. And not only is he obliged to receive and carry such goods, but he is required to carry for all his employers alike. He can show no favors, nor make distinctions which will give one employer an advantage over another, either in the time or order of shipment, or in the distance of the carriage, or in the conveniences or accommodations which may be afforded.⁵⁹ “Common carriers are bound

57. The Nitro-Glycerine Case, 15 Evans v. Railroad Co., — Ky. Wall. 524. —, 90 S. W. Rep. 588.

58. *Ante*, § 144, *et seq.*

In Memphis News Pub. Co. v.

59. State v. Railroad Co., — Railway Co., 110 Tenn. 684, 75 Neb. —, 101 N. W. Rep. 23; S. W. Rep. 941; 63 L. R. A. 150,

to carry indifferently, within the usual range of their business, for a reasonable consideration, all freight offered and all passengers who apply. For similar equal services, they are entitled to the same compensation. All applying have an equal

the defendant carrier operated a line of road between the cities of Memphis, Tenn., and Huntsville, Ala. The Commercial Publishing Company was engaged in publishing a morning newspaper in the city of Memphis. At that time there was no early train service out of Memphis by which newspapers could be carried to points between that place and Huntsville. Conceiving the idea that the value of its newspaper would be largely enhanced by the establishment of such a train, it entered into a contract with the defendant carrier in which it was agreed that the defendant, in consideration of certain compensation to be paid it by the Commercial Publishing Company would operate a passenger train which would leave Memphis about 4 a. m. daily. It was further agreed that such train would carry all newspapers which the Commercial Publishing Company might desire to distribute between Memphis and Huntsville, and that it would refuse to carry on such train the newspapers or publication of any other publishing company; but other newspapers or publications were to be transported upon any other train or trains of the carrier, except the one in question. The train thus provided for was soon thereafter put into operation and was made one of the carrier's scheduled trains. It was controlled exclusively by the defendant company, and all the revenue derived from it belonged to the defendant company. It carried passengers and their baggage, United States mail, express matter and all such freight as is usually transported on passenger trains of a commercial railroad. Soon after the train was put into operation, the complainant, the Memphis News Publishing Company, began the publication in the city of Memphis of a daily morning paper. Having secured subscribers in the territory reached by the defendant's road, and being desirous of reaching these subscribers at as early an hour as possible, it demanded the right to ship as freight its packages of newspapers directed to various stations along the line of road where the train was scheduled to stop and tendered the usual charges for the same. The demand, however, was refused, the defendant resting its right to do so upon the ground that it was restrained from such carriage by the terms of its contract with the Commercial Publishing Company. The complainant thereupon offered to enter into a contract with the defendant assuming the same liability in every respect as that assumed by the Commercial Publishing Company, but such offer was refused, whereupon it filed a bill for injunction and other relief. In affirming a decree for the complainant, the supreme court of Tennessee said: "It is true a common carrier may become a private carrier or bailee for hire when as

right to be transported, or to have their freight transported, in the order of their application. They cannot legally give undue and unjust preferences, nor make unequal and extravagant charges. Having the means of transportation, they are liable to an action if they refuse to carry freight or passengers without just ground for such refusal. The very definition of a common carrier excludes the right to grant monopolies or to give special or unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in the order of their application.’⁶⁰

a matter of accommodation or special agreement he undertakes to carry something which it is not his business to carry. *Hutchinson on Carriers*, sec. 44. . . . But when a carrier has a regularly established business of carrying all of certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carrying of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character. . . . The train in question was a scheduled one, advertised to the world as such. An invitation was given to the public to take passage and ship freight upon it. . . . So far as the record shows, it received on this train merchandise from every other member of the community, and refused carriage alone to that of this complainant; and this refusal is based, not upon a lack of carrying capacity, but exclusively upon the ground that it had contracted away its duty, in respect to such property as the complainant had tendered, to another party. Such an excuse can-

not relieve the railway company from its obligations to the complainant as one of the public.”

Where the plaintiff had constructed his coal mine adjoining the defendant's track, and had been supplied with cars for some time by the defendant for the transportation of his coal, it was held that mandamus would be granted to compel the defendant to furnish cars where its refusal to do so was based on the ground that the plaintiff would not sell his coal below the market value to a company in which the defendant's president was interested. *Lorraine v. Railroad Co.*, 205 Penn. St. 132, 54 Atl. Rep. 580, 61 L. R. A. 502.

60. *New England Express Co. v. Maine Central Railroad Co.*, 57 Me. 188. See also, *Express Co. v. Railway Co.*, 81 Me. 92.

A railroad company which controls a switch connecting a certain stone quarry with its main line, and which switch is a part of its general system, cannot lawfully refuse to accept stone for carriage when offered by the owner of another nearby stone quarry at such points on the switch where it may be reasonable for it to re-

Sec. 513. Same subject—Difference in situation of shippers may justify a preference.—But while, as a general rule, the carrier in providing vehicles for the transportation of goods is not permitted to show preferences which will give to one employer an advantage over another, there can be no actionable discrimination between those whose situation and relations to the carrier, with reference to the commodity to be shipped, are so different as to justify or demand a difference in treatment. For example, in the matter of furnishing cars for the shipment of coal from any given station, the carrier may adopt a different rule for those who load by tippie on cars placed on their own private tracks, which are used exclusively for handling coal, than for those who load by wagon on cars placed on the carrier's tracks which are used for the transaction of general business. For in the former case the carrier would not be seriously interrupted in the discharge of his duty to the public in the transportation of passengers as well as all classes of freight, while in the latter case he would be.¹

Sec. 514. (§ 298.) Same subject—Duty to furnish facilities to express companies without discrimination.—There is a square conflict of the authorities as to whether a railroad is compelled to furnish to an express company facilities and accommodations for its express business which are equal to those furnished by it to another express company. The more conservative jurisdictions hold that there is no such duty on

ceive it. *Bedford-Bowling Green Co. v. Oman*, 24 Ky. L. R. 2274, 73 S. W. Rep. 1038, 115 Ky. 369, s. c. 134 Fed. 441.

In *State ex rel Cumberland Telephone & Telegraph Co.*, 52 La. Ann. 1850, 28 So. Rep. 284, and *Cumberland Telephone & Telegraph Co.*, 51 La. Ann. 29, 24 So. Rep. 803, a writ of mandamus was held to lie to compel a railroad to haul special cars and run special trains in order to distribute

poles, wires and cross arms between stations, and, in short, to afford the *Cumberland Telephone & Telegraph Co.* the same facilities it extended to the *Western Union Telegraph Co.*, its rival.

Property must be transported in the order in which it is received, without partiality or favor. *Houston, etc. Ry. Co. v. Smith*, 63 Tex. 322.

1. *Railway Co. v. State*, — Ark. —, 84 S. W. Rep. 502.

the part of the railroad. The more progressive jurisdictions hold that there is a public duty involved, and that a railroad cannot discriminate between express companies.² One of the earliest cases holding the latter view was that of the New England Express Company against the Maine Central Railroad,³ which was an action by the express company against the railroad company for a refusal to accept and carry upon its passenger train. The plaintiff alleged that it was ready to pay or secure the payment of a reasonable sum for such service, and to comply with all the usual and reasonable terms applicable to the transportation of express matter, and that defendants refused to receive and transport its parcels and property upon said passenger train, though they were transporting express matter for the Eastern Express Company on their passenger trains at the time. The fact was that the railroad company had entered into a contract with one express company, to give to it for a period of years certain exclusive accommodations and privileges in the passenger trains of the road for the carrying of express freight, which it had subsequently denied to the plaintiff, another express company, upon its application to be allowed the same privileges; and the action, although in form for a refusal to carry the plaintiff's goods, was in effect for damages for the undue preference, which it was denied that the defendant had the right to extend to a rival company. And upon this principle, that the company was bound to serve all who might apply, alike and upon the same terms, it was held liable to the action. It was said that, independently of the statute which prohibited such a preference and monopoly, the right of action existed upon common-law principles. And in speaking of the defendant company as a railroad carrier, the learned judge went on to say: "The defendants derived their chartered rights from the state. They owe an equal duty to each citizen. They are allowed

2. See upon this subject the able article by Bruce Wyman in *The Green Bag*, Vol. XVII., p. 570. 3. 57 Me. 188. This case was followed in *International Exp. Co. v. Railway Co.*, 81 Me. 92.

to impose a toll, but not to be so imposed as specially to benefit one and injure another. They cannot, having the means of transporting all, select from those who may apply some whom they will, and reject others whom they can, but will not, carry. They cannot rightfully confer a monopoly upon individuals or corporations. They were created for no such purpose. They may regulate transportation; but the right to regulate gives no authority to refuse, without cause, to transport certain individuals and their baggage or goods, or to grant exclusive privileges of transportation to others. The state gave them a charter for no such purpose."

Sec. 515. (§ 299.) Eame subject.—In *McDuffee v. The P. & R. Railroad*,⁴ the action was in case for not furnishing to the plaintiff terms, facilities and accommodations for his express business upon the defendant's road, reasonably equal to those furnished by it to another express company. The declaration was demurred to, and the court, after arguing at length that, independently of statutory provisions, the common carrier was bound on common-law principles to furnish equal facilities for the transportation of their goods to all who might apply, overruled the demurrer, holding the action to be maintainable, and using the following language: "This being a case in some respects of novel impression in this state, the plaintiff's counsel, in drawing the declaration, very prudently referred to the statute and inserted several counts of considerable length and elaboration. Since we hold that damages suffered by the plaintiff from an unreasonable discrimination made by the defendant between the plaintiff and the Eastern Express Company or any one else, in terms, facilities or accommodations—damage caused by any undue or unreasonable preference or advantage made or given by the defendants as common carriers, to or in favor of any particular person or company, or caused by any undue or unreasonable prejudice or disadvantage to which the defendants subjected the plaintiff, is a cause of action at common law, a good and sufficient count can easily be drawn for such a cause of action without reference to the statute."

Sec. 516. (§ 300.) Same subject.—In *Standford v. The Railroad Company*,⁵ a bill in equity was resorted to for the purpose of restraining the railroad from the performance of a contract by which it had attempted to grant to an express company the exclusive privilege of carrying freight upon its passenger trains, to the detriment, as was alleged, of the complainant, another express company, who had been denied the same privilege. The court held that the injunction was proper, and ordered that the contract should be canceled, using this language: “Limited means may perhaps limit the amount of business done by a railroad company, but it can never furnish an excuse for appropriating its energies to any particular individuals. If it possesses this power, it might build up one set of men and destroy others, advance one kind of business and break down another, and might make even religion and politics the tests in the distribution of its favors. Such a power in a railroad corporation might produce evils of the most alarming character. The rights of the people are not subject to any such corporate control. Like the customers of a grist-mill, they have a right to be served, all other things equal, in the order of their applications. A regulation, to be valid, must operate on all alike. If it deprives any persons of the benefits of the road or grants exclusive privileges to others, it is against law and void.”

The doctrine of the above three cases is also the law in England.⁶

Sec. 517. (§ 300a.) Same subject—The “Express Cases” in the United States supreme court.—This whole question of the legal right of express companies to transact their business upon the railroads of other corporations was exhaustively considered and conclusively settled as to interstate commerce by the United States supreme court in what are known as the *Express Cases*.⁷ In these cases, which were considered together, it appeared that the respective express companies had

5. 24 Pa. St. 378.

Co., 7 M. & G. 253.

6. *Pickford v. Railway Co.*, 10

7. 117 U. S. 1.

M. & W. 399; *Parker v. Railway*

been doing business over various lines of railroad in pursuance of contracts to that effect, which determined the rights and obligations of both parties, and which also provided that the contract might be terminated by either party upon giving a stipulated notice. The railroad companies having terminated the contracts in accordance with their terms, the actions were brought by the express companies to compel the railroads, as common carriers, to permit the express companies to continue, as a matter of legal right, to transact their business substantially as they had previously transacted it under these contracts. The court below granted the relief prayed by the express companies,⁸ but the supreme court reversed the decree,⁹ holding, in substance, that railroad companies are not required by usage or by the common law to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried and handled; that they are not obliged, either by common law or usage, to do more as express carriers than to provide the public at large with reasonable express accommodation; and that they need not, in the absence of a statute requiring it, furnish to all independent express companies equal facilities for doing an express business upon their passenger trains.¹⁰

Sec. 518. Right of one express company to use the facilities of another express company.—Undoubtedly one express company has the same right as the general public to make

8. Mr. Justice Miller, Circuit Judge McCrary and District Judge Treat concurred in the decision below.

9. Justices Miller and Field dissented.

10. The doctrine of the "Express Cases" has been approved by State courts in the following cases: *Pfister v. Railroad Co.*, 70 Cal. 169; *Railway Co. v. Keefer*, 146 Ind. 21, 44 N. E. Rep. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348;

Sargent v. Railroad Co., 115 Mass. 416; *Atlantic Express Co. v. Railroad Co.*, 111 N. C. 463, 16 S. E. Rep. 393, 18 L. R. A. 393, 32 Am. St. Rep. 805.

But this rule has been changed by statute in Massachusetts, and railroads cannot now discriminate there in interstate business between express companies. *Kidder v. Railroad Co.*, 165 Mass. 398, 43 N. E. Rep. 115.

use of the facilities of another express company, providing it pays or offers to pay the same rates as the general public. But it has no right to use those facilities in such a way as to destroy the other company's business. In a case decided by the High Court of Justice for Ontario, it appeared that it was the plaintiff's custom to gather together a number of smaller parcels which would ordinarily be expressed separately by merchants, put them in hampers or packed parcels and tender them to the defendant express company to be carried on the tariff charged for parcels under 100 pounds in weight, paying for such packed parcels very much less than would be charged for the several parcels if sent separately. The effect was to deprive the defendant company of the most lucrative part of its business. The court held that the express company had the right to charge for each parcel according to the ordinary rates, and to require from the plaintiff a statement of the number of parcels placed in the packed parcel, and that the defendant express company had never intended to hold itself out to the public as the carrier of a rival express company, making use of its capital and facilities for doing business to the aggrandizement of its rival and its own destruction.¹¹

Sec. 519. Giving preference to one connecting carrier over another.—The common-law obligation of the carrier to receive, transport and deliver the goods of a connecting carrier is the same as that which exists between the carrier and an individual. Whatever rights and privileges, other than those belonging to a natural person, that are claimed by the carrier as against a connecting carrier must be found either in the charters of the carriers or arise from contract.¹² But, although the carrier is bound to receive, transport and deliver the goods of a connecting carrier without discrimination, as between himself and succeeding carriers, he is at liberty to

11. *Johnson v. Express Co.*, 28 A. 811, *overruling* 70 N. H. 631, Ont. R. 203. 47 Atl. Rep. 614 and 69 N. H. 650.

12. *Hedding v. Gallagher*, 72 N. 45 Atl. Rep. 96, 76 Am. St. Rep. H. 377, 57 Atl. Rep. 225, 64 L. R. 204.

determine for himself what succeeding carrier he will employ in sending the goods beyond his own route. He puts himself in no worse position by extending his route by the help of others than he would occupy if the means of transportation employed were all his own. He may certainly, therefore, as between himself and succeeding carriers, select his own agencies and his own associates for doing his work.¹³

So at common law the furnishing of equal facilities to other carriers without unjust discrimination will not require the carrier to advance money to all other carriers on the same terms, nor give credit for the carriage of articles of trade and commerce to all other carriers because he extends credit for such services to others.¹⁴

Sec. 520. (§ 301.) Giving preference to one shipper over another.—The rights of all shippers of goods of like kind applying for cars at the same station, and under the same circumstances, are equal,¹⁵ and unjust discriminative contracts between the carrier and a favored shipper are void. Thus in *Messenger v. Pennsylvania Railroad*,¹⁶ an action was brought against the road upon a contract by which it had agreed to carry for the plaintiff at a less rate than for other persons. The action was held not to be maintainable because the contract was void. "The defendants," say the court, "are common carriers, and it is contended that bailees of that character cannot give a preference in the exercise of their calling to one dealer over another. It cannot be denied that, at common law, every person under identical conditions had an equal right to the services of their commercial agents. It was one of the primary obligations of the common carrier to

13. *St. Louis Drayage Co. v. Railroad Co.*, 65 Fed. 39; *Atchison, T. & S. F. Ry. Co. v. Denver & O. R. Co.*, 110 U. S. 680, 4 Sup. Ct. R. 185.

14. *Express Co. v. U. S. Express Co.*, 88 Fed. 659; *affirmed in* 92 Fed. 1022, 35 C. C. A. 172.

15. *Nichols v. Railroad Co.*, 24 Utah, 83, 66 Pac. Rep. 768, 91

Am. St. Rep. 778. In this case it was held that if the carrier agrees to furnish cars to one shipper at a certain date, to furnish cars to other shippers who apply subsequently before furnishing cars to the shipper who first applied will constitute an unlawful discrimination.

16. 7 Vroom. 407.

receive and carry all goods offered for transportation upon receiving a reasonable hire. If he refused the offer of such goods he was liable to an action unless he could show a reasonable ground for his refusal. Thus, in the very foundation and substance of the business, there was inherent a rule which excluded a preference of one consignor of goods over another. The duty to receive and carry was due to every member of the community and in an equal measure to each. Nothing can be clearer than that, under the prevalence of this principle, a common carrier could not agree to carry one man's goods in preference to those of another." And in the *Great Western Railroad v. Burns*,¹⁷ it was held that the common carrier, a railroad company, could not, under any circumstances, delay the transportation of goods which had been already delivered to him and were awaiting shipment, in order to receive and forward other goods.¹⁸

Sec. 521. (§ 302.) Same subject—Discrimination in rates.

—The same principles become important in determining what, if any, discrimination may lawfully be made by the carrier in the rate charged to different shippers. This is a question of great importance and one which has been much considered. The cases contain many statements which seem to be in conflict, yet, except where the consideration is influenced by local statutes, it is believed that all the cases are in substantial harmony in reference to the vital principles involved.¹⁹

17. 60 Ill. 284.

18. And see *Keeney v. The Railroad*, 47 N. Y. 525; *Wibert v. The Railroad*, 12 N. Y. 245; *The Chicago, etc. R. R. v. The People*, 56 Ill. 365; *The C. & A. R. R. v. The People*, 67 Ill. 11. A carrier cannot refuse to carry goods, *e. g.*, coal from a mine, because the owner also ships like goods from the same place by another carrier. *Chicago, etc. R. R. Co. v. Suffern*, 129 Ill. 274, 21 N. E. Rep. 824.

19. See the following cases upon this subject:

United States: Menacho v. Ward, 27 Fed. Rep. 529; *Kinsley v. Railroad Co.*, 37 Fed. Rep. 181; *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309; *Express Co. v. U. S. Express Co.*, 88 Fed. 659; *affirmed in* 92 Fed. 1022, 35 C. C. A. 172; *Murray v. Railway Co.*, 92 Fed. 868, 35 C. C. A. 62, *affirming* 62 Fed. 24; *Tift v. Railway Co.*, 123 Fed. 789; *Railway Co. v. United States*, 117 U. S. 355, 6 Sup. Ct. R. 772.

Arkansas: Railway Co. v. Oppenheimer, 64 Ark. 271, 44 L. R. A. 353, 43 S. W. Rep. 150.

At the foundation of the whole matter lies the common-law rule, just and well settled, that in each particular case there shall be charged a reasonable compensation and no more.²⁰ In this, as in every other case, the question of what is reasonable depends upon the circumstances of each particular case, and this ordinarily becomes a question of

California: Cowden *v.* Pacific Coast S. S. Co., 94 Cal. 470, 29 Pac. Rep. 873, 28 Am. St. Rep. 142, 18 L. R. A. 221.

Colorado: Railway Co. *v.* Bayles, 19 Colo. 348, 35 Pac. Rep. 744; *s. c.* Bayles *v.* Railway Co., 13 Colo. 181, 22 Pac. Rep. 341.

Florida: Johnson *v.* Railroad Co., 16 Fla. 623.

Illinois: Illinois Cent. R. Co. *v.* People, 121 Ill. 304; Railroad Co. *v.* Ervin, 118 Ill. 250; Chicago, etc. R. Co. *v.* People, 67 Ill. 11; Chicago, etc. Ry. Co. *v.* People, 56 Ill. 365; Vincent *v.* Railroad Co., 49 Ill. 33; Railway Co. *v.* Elliott, 76 Ill. 67; Illinois, etc. *v.* Beaird, 24 Ill. App. 322; Railroad Co. *v.* Crawford, 65 Ill. App. 113; Despatch Co. *v.* Cecil, 112 Ill. 185.

Indiana: Railroad Co. *v.* Wilson, 132 Ind. 517, 32 N. E. Rep. 311, 18 L. R. A. 105; *s. c.* 119 Ind. 353, 21 N. E. 341.

Maine: New England Exp. Co. *v.* Railroad Co., 57 Me. 188.

Massachusetts: Fitchburg R. Co. *v.* Gage, 12 Gray, 393; Spofford *v.* Railroad Co., 128 Mass. 326.

Missouri: Christie *v.* Railway Co., 94 Mo. 453, 7 S. W. Rep. 567; McNees *v.* Railway Co., 22 Mo. App. 224.

New Hampshire: McDuffee *v.* Railroad Co., 52 N. H. 447.

New Jersey: Messenger *v.* Railroad Co., 36 N. J. L. 407; Stewart *v.* Railroad Co., 38 N. J. L. 505.

New York: Root *v.* Railroad Co., 114 N. Y. 300; Lough *v.* Outerbridge, 143 N. Y. 271, 38 N. E. Rep. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674, *affirming* 22 N. Y. Supp. 976; Kellogg *v.* Sowersby, 87 N. Y. Supp. 412, 93 App. Div. 124; Strough *v.* Railroad Co., 87 N. Y. Supp. 30, 92 App. Div. 584; Langdon *v.* Railroad Co., 9 N. Y. Supp. 245.

Ohio: Scofield *v.* Railway Co., 43 Ohio St. 571 (a well considered and the most exhaustive of the cases); State *v.* Railway Co., 47 Ohio St. 130, 23 N. E. Rep. 928; Brundred *v.* Rice, 49 Ohio St. 640, 32 N. E. Rep. 169, 34 Am. St. Rep. 589.

Pennsylvania: Hersh *v.* Railroad Co., 74 Pa. St. 181; Audenried *v.* Railroad Co., 68 Pa. St. 370; Shipper *v.* Railroad Co., 47 Pa. St. 338; Sanford *v.* Railroad Co., 24 Pa. St. 378; Hoover *v.* Railroad Co., 156 Pa. St. 220, 27 Atl. Rep. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263.

South Carolina: Benson, *Ex parte*, 18 S. C. 38.

Tennessee: Ragan *v.* Aikin, 9 Lea. 609.

20. Scofield *v.* Railway Co., 43 Ohio St. 571; Root *v.* Railroad Co., 114 N. Y. 300; Christie *v.* Railway Co., 94 Mo. 453; Railway Co. *v.* Bayles, 19 Colo. 348, 35 Pac. Rep. 744; *s. c.* Bayles *v.* Railway Co., 13 Colo. 181, 22 Pac. Rep. 341;

fact.²¹ A reasonable compensation in each case does not, however, necessarily mean absolute uniformity of rates in all cases.²² It simply requires that there shall be no unreasonable, and hence no unjust, discrimination.

Tift v. Railway Co., 123 Fed. 789; *Railway Co. v. Oppenheimer*, 64 Ark. 271, 43 S. W. Rep. 150, 44 L. R. A. 353, citing *Hutchinson on Carr.*

21. *Root v. Railroad*, 114 N. Y. 300, and cases cited in first note.

If the facts of an alleged unlawful discrimination are well established or undisputed, the question of whether or not a statute forbidding discrimination is applicable is a question of law for the court and not of fact for the jury. *Hoover v. Railroad Co.*, 156 Pa. 220, 27 Atl. Rep. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43.

22. *Railway Co. v. Bayles*, 19 Colo. 348, 35 Pac. Rep. 744; *s. c.* *Bayles v. Railway Co.*, 13 Colo. 181, 22 Pac. Rep. 341; *Scofield v. Railway Co.*, 43 Ohio St. 571; and cases cited in first note.

In *Cleveland, etc. Ry. Co. v. Closser*, 126 Ind. 348, 25 N. E. Rep. 159, *Elliott, J.*, says:

"The common-law authorities (and by them the case is ruled) fully support the doctrine that a mere discrimination will not invalidate a contract; to have that effect, other elements must enter into the contract; but when such elements are present in such force as to make the discrimination unjust or oppressive, the contract will be illegal. It is not necessarily or *per se* a legal wrong for a carrier to give better rates to one who ships many car-loads of grain than to one who ships a single car-load or a single bushel.

It is a matter of common knowledge, and therefore one of which judicial notice is taken, that an increase in the volume of business is desirable and advantageous, and in the rivalry of business competition it is lawful to favor those whose business is great rather than those whose business is small or inconsiderable. In the case of *Nicholson v. Railway Co.*, 5 C. B. (N. S.) 366, 1 Nev. & McN. 143, *Erle, C. J.*, said: 'I take the free power of making contracts to be essential for the purpose of making commercial profits. Railway companies have that power as free as any merchants, subject only (as to this court) to the duty of acting impartially without respect of persons; and this duty is performed, when the offer to contract is made, to all who wish to adopt it. Large contracts may be beyond the means of small capitalists; contracts for long distances may be beyond the needs of some whose traffic is confined to a home district; but the power of the railway company to contract is not restricted by these considerations.' It is obvious that, whether the common carrier acts impartially or not depends upon the circumstances of the particular case, for regard must be had to such circumstances as quantity, distance and kindred considerations. The hinge of the question is not found in the single fact of discrimination for discrimination without

Mere inequality in charges does not, therefore, of itself amount to an unjust discrimination.²³ It only becomes such when a discrimination is made in the rates charged for transportation of the goods of the same class of different shippers under like circumstances and conditions.²⁴

So a mere reduction from the established rate is not necessarily an unjust discrimination.²⁵ But it becomes such when it is either intended or has a natural tendency to injure another shipper in his business and destroy his trade by giving to the favored shipper a practical monopoly of the business.²⁶

A discrimination, however, made merely upon the amount of freight furnished, and which results in giving to the large shipper an advantage over the smaller is not reasonable;²⁷

partiality is inoffensive, and partiality exists only in cases where advantages are equal, and one party is unduly favored at the expense of another who stands upon an equal footing. Many English cases support this general doctrine. *Garton v. Railway Co.*, 1 Best & S. 110; *Hozier v. Railway Co.*, 1 Nev. & McN. 29; *Railway Co. v. Sutton*, L. R. 4 H. L. 238; *Ransome v. Railway Co.*, 1 C. B. (N. S.) 437; *Jones v. Railway Co.*, 1 Nev. & McN. 45; *Oxlade v. Railway Co.*, *id.* 72; *Baxendale v. Railway Co.*, 5 C. B. (N. S.) 336; *Bellsdyke Coal Co. v. North British Ry. Co.*, 2 Nev. & McN. 105. The current of judicial opinion in America flows in the general channel marked out and opened by the courts of England."

23. *Scofield v. Railway Co.*, 43 Ohio St. 571; *Christie v. Railway Co.*, 94 Mo. 453; *Fitchburg R. R. Co. v. Gage*, 12 Gray, 393; *Hoover v. Railroad Co.*, 156 Pa. St. 220, 27 Atl. Rep. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263, citing *Hutchinson on Carr.*; *Langdon v. Railroad Co.*, 9 N. Y. Supp. 245.

24. *Scofield v. Railway Co.*, 43 Ohio St. 571; *Messenger v. Railroad Co.*, 36 N. J. L. 407; *Railway Co. v. Bayles*, 19 Colo. 348, 35 Pac. Rep. 744; *s. c. Bayles v. Railway Co.*, 13 Colo. 181, 22 Pac. Rep. 341; *Hoover v. Railroad Co.*, 156 Pa. St. 220, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263.

25. *Christie v. Railway Co.*, 94 Mo. 453, and cases above cited.

26. This was the leading question in *Scofield v. Railway Co.*, 43 Ohio St. 571, and is fully treated. See also, *Railroad Co. v. Wilson*, 132 Ind. 517, 32 N. E. Rep. 311, 18 L. R. A. 105; *s. c.* 119 Ind. 353, 21 N. E. Rep. 341.

27. *Scofield v. Railway Co.*, 43 Ohio St. 571; *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309; *Kinsley v. Railroad Co.*, 37 Fed. Rep. 181; *Railroad Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105; *s. c.* 119 Ind. 353, 21 N. E. Rep. 341.

But a common carrier by water may offer a reduced rate to one in consideration of his shipping all his goods by such carrier's line for a specified time, if it offers the

neither is a discrimination, having practically the same result, giving to a shipper transporting oil, in his own car, a preference in rates over one who ships in barrel.²⁸

So, obviously, a secret rebate allowed to certain shippers is an unjust discrimination against others shipping like goods under the same circumstances. And the excessive charges to the shippers discriminated against, paid by them without knowledge that they are in excess of those charged other shippers, and in reliance upon the representation of the carrier that all the charges are uniform, are not voluntarily paid and may be recovered from the carrier.²⁹

Sec. 522. (§ 303.) Same subject—The English rule.—The practice of giving preferences to certain individuals as to the time of forwarding their goods by railroad companies in England, which, it seems, enjoy almost a monopoly of the carrying business in that country, became a grievance there,³⁰ which was put a stop to by their Railway and Canal Traffic

same terms to all, and will transport goods for a reasonable price for such persons as are not willing to agree to such condition. *Lough v. Outerbridge*, 143 N. Y. 271, 38 N. E. Rep. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674, *affirming* 22 N. Y. Supp. 976.

28. *State v. Railway Co.*, 47 Ohio St. 130, 23 N. E. Rep. 928.

29. *Cook v. Railway Co.*, 81 Iowa, 551, 46 N. W. Rep. 1080; *Railroad Co. v. Wilson*, 132 Ind. 517, 32 N. E. Rep. 311, 18 L. R. A. 105; s. c. 119 Ind. 353, 21 N. E. Rep. 341; *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470, 29 Pac. 873, 28 Am. St. Rep. 142, 18 L. R. A. 221.

This right is given by the common law independent of any statute. *Murray v. Railway Co.*, 92 Fed. 868, 35 C. C. A. 62, *affirming* 62 Fed. 24.

A railroad company is not war-

ranted in making a contract whereby it binds itself to carry for one shipper crude petroleum or other articles at half the rate it agrees to charge all others for the same service, at the same time and as part of the agreement binding itself to charge all others double the amount as a fixed open rate, and to pay such favored shipper one half of it when collected in consideration of his agreeing to establish and maintain a system of pipe lines to its road. Money so paid by a shipper in ignorance of the agreement and received by the favored shipper may be recovered back in an action for money had and received by the former against the latter. *Brun-dred v. Rice*, 49 Ohio St. 640, 32 N. E. Rep. 169, 34 Am. St. Rep. 589.

30. *Parker v. Railway Co.*, 7 M. & Gran. 253.

Act (1854), to which reference has already been made.³¹ One of the sections of this act prohibited such companies from making or giving any undue or unreasonable preference or advantage to or in favor of any particular person or company

31. This act has been interpreted to apply to preferences in the rates charged for the service of carrying as well as to other preferences or advantages, but not to prohibit just and reasonable discriminations in that respect. Although the purpose of the act is to prevent, among other things, unreasonable discrimination in rates to the prejudice or disadvantage of particular individuals, it was not, it has been said, to relieve every person from all possible prejudice or disadvantage from any arrangement which might be made by the carrier, if the arrangement was for the benefit of the public at large, for the reasonable increase of the business and profits of the carrier, and was not entered into with a view to the advantage or preference of one party or disadvantage of the other. Hence it has been held legal, under the provisions of the act, to carry at a less rate for such persons as would guaranty large quantities of the same kind of freight than for those who could not give such guaranty. So when the quantity of goods furnished for carriage was sufficient to employ an entire train instead of a portion of it, or the carriage was for a greater distance, or was upon a through train requiring no stoppages, or upon a train run at a regular time, according to the course of the business of the carrier, and not upon an irregular one run out of the due course, or where the quantity carried for the one customer is larger than that carried for another, the carrier will be justified in charging proportionately less than when the distance or quantity is less, or the trip out of due course, or at an irregular time. Or he may class his trains or his vehicles according to the accommodations afforded or their speed, and vary his charges accordingly. So the courts will not interfere if the charge or arrangement will greatly promote the interest of the carrier without unreasonably prejudicing those who may desire to employ him, or will be beneficial to the community, though disadvantageous to particular individuals. And he may charge more for small parcels in proportion to weight than for larger ones of the same commodity, by reason of the greater proportionate trouble and their greater exposure to loss and theft. But though the court, when such a question is brought before it under the statute, it is said, will feel great reluctance in interfering with the carrier in the management of his own business, and his interest must be taken into the account, yet if the discrimination made by him subjects others to unreasonable disadvantages, it will interfere and enjoin the carrier from making such preferences. And so it will if the object of the carrier is not solely his own advantage, but also to give

or any particular description of traffic in any respect whatever, with the further provision for a summary proceeding before the court of common pleas or any of its judges by motion or summons to restrain such companies from the violation of this provision of the act and to compel a compliance with it by writ of attachment.

Sec. 523. Same subject—Statutory regulation—The Interstate Commerce Act.—The question has also been made the subject of much statutory regulation in the United States. Conspicuous among the acts is one commonly known as “The Interstate Commerce Act,” passed by the congress of the United States. The act finds its authority in the well-known clause of the constitution of the United States conferring upon congress power “To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” The first four sections only are applicable to the point now under consideration, but for the convenience of practitioners the text of the entire act, together with the text of the Elkins Act, as amended June 29, 1906, is given herewith:

THE INTERSTATE COMMERCE ACT.

AS AMENDED.

“SECTION 1. That the provisions of this Act shall apply, to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines or partly by pipe lines and partly by railroad,

a preference to one individual to the disadvantage of another, or to one locality to the prejudice of another.

And see 1 Chitty on Con. (11 Am. ed.), 687; *Oxlade v. Ry. Co.*, 1 C. B. (N. S.) 454; *In re Ransome*, *id.* 437; *Baxendale v. Railway Co.*, 3 *id.* 324; 5 *id.* 336; *Nicholson v. Railway Co.*, 5 *id.* 366; *In re Jones*, 3 *id.* 718; *Robinson v. Railway Co.*, 35 L. J., C. P. 123; *Pickford v. Railway*, 10 M. & W. 422; *Davis v. Taft Vale*.

R. Co., 64 L. J. Q. B. (N. S.) 488.

That real and substantial competition is a material factor in determining rates under the second section of the Railway and Canal Traffic Act, 1854, see *Phipps v. Railway Co.*, 61 L. J. Q. B. 379, (1892) 2 Q. B. 229.

On the effect of s. 33, *sub. s.* 3, of the Railway and Canal Traffic Act, 1888, see *New Union Mill Co.*, (1896) 2 Q. B. 290, 65 L. J. Q. B. 493.

or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivery, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

"The term 'common carrier,' as used in this Act, shall include express companies and sleeping car companies. The term 'railroad,' as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and un-

reasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

"No common carrier subject to the provisions of this Act shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian associations, inmates of hospitals, and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the national homes or state homes for disabled volunteer soldiers and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge, and boards of managers of such homes; to necessary caretakers of live stock, poultry, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employees, postoffice inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars; and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an act entitled 'An act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, and any amendment thereof."

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any

interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

"Any common carrier subject to the provisions of this Act upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money."

Sec. 1 was originally as follows:

"[SECTION 1. That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property,

wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

"The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.]"

"SECTION 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

"SECTION 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

"SECTION 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater com-

pensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

"SECTION 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense."

"SECTION 6. That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where

passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act."

"Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production."

"No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions."

"The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties. Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party."

"The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public in-

spection shall be prepared and arranged and may change the form from time to time as shall be found expedient."

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided*, That wherever the word 'carrier' occurs in this Act it shall be held to mean 'common carrier'."

"That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic."

Sec. 6 was originally as follows:

"[SECTION 6. That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected."

"Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates estab-

lished and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed."

"No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given."

"And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

"Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published."

"No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, except after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made in joint rates, fares, and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates. The Commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs."

"It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time."

"The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient."

"If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and if such common carrier be a foreign corporation in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this act; and the failure to comply with its requirements shall be punishable as and for a contempt; and the said Commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act.]"

"SECTION 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract,

or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act."

"SECTION 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

"SECTION 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

"SECTION 10. That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause

to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

"Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and wilfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense."

"Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction

within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court."

"If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom."

"SECTION 11. That a commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission."

"SECTION 12. That the Commission hereby created shall have author-

ity to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation."

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section."

"And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

"The testimony of any witness may be taken, at the instance of a party in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation.

Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided."

"Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent."

"If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission."

"Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States."

"SECTION 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said

complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

"Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made."

"No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

"SECTION 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

"All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of."

"The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports."

Section 14 was originally as follows:

"[SECTION 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

"All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

"The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be compe-

tent evidence of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several States, without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.]”

“SECTION 15. That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto which order shall take effect as a part of the original order.”

“The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or

satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

"The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act."

Section 15 was originally as follows:

"[SECTION 15. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.]"

"SECTION 16. That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

"If a carrier does not comply with an order for the payment of

money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this act may be presented within one year."

"In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff."

"Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be prima facie evidence of the receipt of such order by the carrier in due course of mail."

"The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

"It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect."

"Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly

fails or neglects to obey any order made under the provisions of section fifteen of this Act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense."

"The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs."

"It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. The Commission may, with the consent of the Attorney-General, employ special counsel in any proceeding under this Act, paying the expenses of such employment out of its own appropriation."

"If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen; for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus."

"From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from."

"The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirements of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts. The provisions of 'An Act to expedite the hearing and determination of suits in equity, and so forth,' approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting Act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes: *Provided*, That no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided further*, That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes."

"The copies of schedules and tariffs of rates, fares, and charges, and of all contracts, agreements, or arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, as required by the provisions of this Act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and

in all judicial proceedings; and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals."

Section 16 originally was as follows:

"[SECTION 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such write of injunction, or other

proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in personam in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the Attorney-General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States."

"If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial the findings of fact of said Commission as set forth in its

report shall be *prima facie* evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but if all the parties shall waive a jury in writing, then the court shall try the issues in said cause and render its judgment thereon. If the subject in dispute shall be of the value of two thousand dollars or more either party may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.]”

“SECTION 16a. That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.”

“SECTION 17. That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those

in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas."

"SECTION 18. That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States."

"All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigations, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission."

"SECTION 19. That the principal office of the Commission shall be in the city of Washington, where its general session shall be held; but whenever the convenience of the public or the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act."

"SECTION 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon;

the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning rates or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept."

"Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the Commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided."

"Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act."

"The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

"The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and ex-

penditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees."

"In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense, and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act."

"Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment."

"Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both."

"That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus com-

manding such common carrier to comply with the provisions of said Acts, or any of them."

"And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence."

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

Sec. 20 was originally as 'follows:

"[SECTION 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employes and the salary paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission

may require; and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.]”

“SECTION 21. That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.”

“SECTION 22. That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers’ and Sailors’ Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employes, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act: *Provided further*, That nothing in this act shall prevent the issuance of joint interchangeable five-thousand mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Inter-

state Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this act shall apply to any violation of the requirements of this proviso."

"SECTION 23. That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs or mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement."

"SECTION 24. That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members, with terms of seven years, and each shall receive ten thousand dollars' compensation annually. The qualifications of the Commissioners and the manner of the pay-

ment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Not more than four Commissioners shall be appointed from the same political party."

HEPBURN ACT.

"SECTION 9. That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act."

"SECTION 10. That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

"SECTION 11. That this Act shall take effect and be in force from and after its passage." [See note below.—Ed.]

Approved, June 29, 1906.

[NOTE: By a joint resolution adopted after the passage of this act it was provided that it should go into effect 60 days after June 29, 1906.]

THE ELKINS ACT

AS AMENDED.

"SECTION 1. That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to

be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Provided*, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein."

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of

the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act."

"Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee, any such carrier shall transport property from one State, or Territory, or the District of Columbia to any other State, Territory, or the District of Columbia or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be."

Section 1 of the Elkins Act was originally as follows:

"[SECTION 1. That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act shall also be held to be a misdemeanor committed by such corporation, and upon conviction

thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this Act for offenses under said Acts to regulate commerce, whether committed before or after the passage of this Act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.]”

"SECTION 2. That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

"SECTION 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled An Act to regulate commerce and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and

papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: *Provided*, That the provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission."

"SECTION 4. That all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed, but such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this Act."

"SECTION 5. That this Act shall take effect from its passage."

Approved February 19, 1903; amended June 29, 1906.

Sec. 524. Who are subject to the Act.—By its terms the act applies to "any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas by means of pipe lines or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment), etc." The term "common carrier," as used in the act, is broadened to include express companies and sleeping car companies, and

the term "railroad," as used in the act, is expressly given the most sweeping signification possible by the provision that it "shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Under the old act the courts had held that express companies, not operating railway lines of their own, were not subject to its provisions,¹ although a railroad conducting an express business was subject to the act.² So the old act was held inapplicable to independent carriers by water,³ and to a stockyards company not engaged in transportation under the definition of the term "transportation" in the old act.⁴ Under the act as amended June 29, 1906, it seems to be the clear intent of congress not only to bring express companies within the purview of the act, but, by enlarging the definition of the term "transportation," to include stockyards companies, irrespective of ownership or of any contract.

1. *United States v. Morsman*, 42 162 U. S. 197, 40 L. ed. 940, 16 Fed. 448; *Southern Indiana Express Co. v. United States Express Co.*, 88 Fed. 659, *affirmed* in 93 Fed. 1022, 35 C. C. A. 172.

2. *Express Co. v. Seibert*, 44 Fed. 310. 6 and *Id.* 52 Fed. 187; *Ex parte Koehler*, 30 Fed. 869.

3. *Texas & Pac. Railway Co. v. Interstate Commerce Commission*, 82 Fed. 839.

4. *Cotting v. Kansas City Stock Yards Co.*, 82 Fed. 839.

Sec. 525. What shipments are subject to the act.—After quoting the first part of the first section of the old act verbatim, which language is repeated in the amendatory act of 1906, the supreme court of the United States in a case before it used the following language: “It would be difficult to use language more unmistakably signifying that congress had in view the whole field of commerce (excepting commerce wholly within a state) as well that between the states and territories as that going to or coming from foreign countries.”⁵ In accordance with that view, it has been held that the act applies to a shipment to or from an unorganized territory,⁶ and even to a shipment involving continuous through transportation between two points in the same state when a part of the route is outside the state through another state or territory.⁷ A state, therefore, can make no law regulating the rate of freight for the transportation of goods between that and another state, and this is so where the regulation prescribed is construed as applying only to the line of the road within the territorial limits of the state.⁸

5. *Tex. & Pac. Railway Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. R. 666, 40 L. Ed. 940, *reversing* 57 Fed. 948, 6 C. C. A. 653, 20 U. S. App. 6 and 52 Fed. 187.

6. *Railway Co. v. Bowles*, 1 Ind. Terr. Rep. 250, 40 S. W. Rep. 899.

7. To bring the transportation on the question of the right to fix rates within the control of the state, as part of its domestic commerce, the subject transported must be during the entire voyage under the exclusive jurisdiction of the state. A state board of railroad commissioners, therefore, has no right to fix rates for continuous transportation between two points in a state, when goods are shipped on a through bill of lading and a large part of

the route is outside the state through another state or territory. Such an action on the part of a state board of railroad commissioners is not within the power of a state and is bad as interfering with the power of Congress to regulate commerce among the several states and with the Indian Tribes. *Hanley v. Railway*, 187 U. S. 617, *affirming* *Kansas, etc. Railway v. Board of Railroad Commissioners*, 106 Fed. 353 and *overruling* *United States v. Railroad*, 115 Fed. 373, *Campbell v. Railway*, 86 Iowa 587, and *Seawell v. Railroad*, 119 Mo. 222, 24 S. W. Rep. 1002.

8. *Gaines v. Railway*, 75 Tex. 572, 12 S. W. Rep. 1001.

A state cannot authorize a recovery for overcharges for freight

Sec. 526. Effect of joint rates in bringing a railroad within the scope of the Act—Commission has power to establish joint rates under certain conditions.—The voluntary making of a through rate on interstate shipments by the joint action of connecting railroads is the act of each, and brings each within the scope of the Interstate Commerce Act, and renders it responsible for such rate, without regard to the proportion thereof received for its own service. This constitutes a “common control, management, or arrangement for a continuous carriage or shipment,” as defined by section one of the act,⁹ and it is immaterial that one of the roads over which the goods pass receives the sole benefit of the rate on its own line.¹⁰ Both lines are subject to the act notwithstanding.

on an interstate shipment involving unjust discrimination. *Gatton v. Railway*, 95 Iowa 112, 63 N. W. Rep. 589, 28 L. R. A. 556.

When cotton has been delivered to a common carrier, to be transported on a continuous voyage or trip to a point beyond the limits of the state it is not subject to state regulations as to compressing. *State v. International, etc. Railroad Co.*, 31 Tex. Civ. App. 219, 71 S. W. Rep. 994.

9. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 118 Fed. 613; *United States v. Seaboard Ry. Co.*, 82 Fed. 563.

When goods shipped under a through bill of lading, from a point in one state to a point in another, are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. *Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. Interstate Commerce Commission*,

162 U. S. 184, 40 L. Ed. 935, 16 Sup. Ct. R. 700, *affirming* *Interstate Commerce Commission v. Cincinnati, etc. Ry. Co.*, 64 Fed. 981, 9 C. C. A. 689, 13 N. S. App. 730, and *reversing* 56 Fed. 925.

A terminal or belt railroad, operating entirely within a state, as it receives shipments of interstate freight on through bills of lading upon whose line the shipment begins or ends, is to be treated as having subjected itself to a common control for a continuous shipment within the first clause of section one of the Interstate Commerce Act. *Interstate Stock Yards Co. v. Railway*, 99 Fed. 472.

A railroad, even if it is a local road, wholly within a state, is not exempted from the provisions of the Interstate Commerce Act in receiving, shipping and forwarding interstate traffic. *Augusta S. R. Co. v. Wrightsville & T. R. Co.*, 74 Fed. 522.

10. *Railroad Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. R. 209, *reversing* *Behlmer v. Railroad*, 83 Fed. 898, 28 C. C. A. 229,

There was nothing in the old Interstate Commerce Act to compel connecting railroads to form through routes or to join in making through rates,¹¹ and the mere fact that goods were intended by the shipper for an ultimate destination beyond the state did not subject the initial carrier to the operation of the act where it received, transported and delivered such goods wholly within one state and had nothing to do with their transportation beyond the state.¹² Local switching or transfer companies, therefore, were not necessarily subject to the act, unless they were parties to a through bill of lading.¹³ In section one of the new act, however, it is provided that "it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto." And in section fifteen of the new act it is also provided that "the commission may also, after hearing a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be

42 U. S. App. 581 and *modifying*
Id. 71 Fed. 835.

11. *Interstate Commerce Commission v. Southern Ry. Co.*, 122 Fed. 800, 60 C. C. A. 540, *affirming* 117 Fed. 741.

A court of equity has no power either at common law or under the Interstate Commerce Act to compel railroad companies to enter into a contract with another company for a joint through rate and joint through routing of passengers. *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 559.

12. *Ex parte Koehler*, 30 Fed. 869; *Missouri & Ill. Railroad Tie & Lumber Co. v. Railway Co.*, 1 Int. Com. Rep. 30.

Under the above rule a class of cases is created in which shipments are interstate and consequently not subject to state regulation, and which still do not come within the purview of the Interstate Commerce Act. See the later sections on state regulation of rates and the following cases:

Cutting v. R. & Nav. Co., 46 Fed. 641; *Railway Co. v. Fort Grain Co.*, 7 Tex. Ct. R. 207, 72 S. W. Rep. 419, 73 S. W. Rep. 845; *Railway Co. v. Barry* (Tex. Civ. App.) 45 S. W. Rep. 814.

13. *Railroad Co. v. Becker*, 32 Fed. 849; *Kentucky, etc. Bridge Co. v. Louisville, etc. R. Co.*, 37 Fed. 567.

necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."

Sec. 527. Principal objects of Act.—"The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights."¹⁴ Subject to the foregoing prohibitions and to the right of the commission under certain conditions to prescribe what will be the just and reasonable maximum rate or rates, joint or several, the act leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and, generally, to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.¹⁵

The act was not intended to re-inforce the provisions of the tariff laws,¹⁶ and in-so-far as it inhibits railroad carriers from

14. *Interstate Commerce Commission v. Baltimore, etc. R. R. Co.*, 145 U. S. 263, 12 Sup. Ct. R. 844, 36 L. Ed. 699, *affirming* 43 Fed. 37; *Interstate Commerce Commission v. Chicago Great W. Ry. Co.*, 141 Fed. 1003. *ing* 76 Fed. 183; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 73 Fed. 409; *Southern Pacific Company v. Interstate Commerce Commission*, 200 U. S. 536.

15. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. R. 896, *id.* 104 Fed. 1005, 43 C. C. A. 682, *affirm-* 16. *Texas, etc. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. R. 666, 40 L. Ed. 940, *reversing* *Interstate Commerce Commission v. Texas, etc. Ry. Co.*, 57 Fed. 948, 6 C. C.

the imposition of unjust and unreasonable rates, is an express adoption by the national legislature of the principles of the common law on this topic.¹⁷

Sec. 528. Act must be construed broadly.—"The intent of congress is to be gathered from a consideration of the entire act, and not solely from detached portions thereof, and the familiar rule of construction is to be followed, to-wit, that in determining the meaning of the words employed, the general purpose of the act and the evils sought to be remedied must be always kept in mind, and, furthermore, parts of the act are not to be so construed as to defeat other important features of the same; nor is such a construction to be given to the act, in whole or in part, as may tend to prevent the proper enforcement of the legislative purpose."¹⁸ So also the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to consider all the circumstances and conditions that reasonably apply to the situation. In the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment.¹⁹

Sec. 529. Reasonableness of rates—Necessity of actual tender of merchandise for shipment.—When a common carrier promulgates a schedule of rates without previous conference with its patrons, it acts under the mandate of the

A. 653, 20 U. S. App. 6, and *id.* 52 Fed. 187.

17. *Tift v. Southern R. Co.*, 123 Fed. 792; *Swift v. Railroad*, 58 Fed. 858.

18. *Van Patten v. Chicago, etc. R. Co.*, 81 Fed. 547.

19. *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*,

162 U. S. 197, 16 Sup. Ct. R. 666, 40 L. Ed. 940, *reversing* *Interstate Commerce Commission v. Texas & Pacific Ry. Co.*, 57 Fed. 948, 6 C. A. 653, 20 U. S. App. 6, and 52 Fed. 187; *Interstate Commerce Commission v. Louisville & N. Railroad*, 73 Fed. 409.

statute that all interstate rates must be fair and reasonable and under and subject to the rule that it may be called to account by the shipper in an action at law for damages, provided any unreasonable or unjust rate or charge is either exacted from the shipper or demanded. When a rate that has been exacted or demanded is challenged on the ground that it was unreasonable or unjust, it is within the province of a court and jury to determine the issue so raised, and to redress the wrong, if one has been committed; but, before an alleged unreasonable rate has been either paid or demanded, or an actual tender of merchandise for shipment has been made, it is not within the legitimate province of a court of equity to interpose and fix a maximum rate, and thereupon enjoin the carrier from demanding more than the rate so established. Such an order effectually deprives an interstate railroad of its right to change and fix rates which is conceded to it by the Interstate Commerce Act. It is tantamount both to making a contract between the shipper and the railroad, and to an exercise of the legislative power of prescribing rates, neither of which powers properly belongs to a court of equity.²⁰

Sec. 530. Interests of public predominant on questions of reasonableness of rates.—While it is true that an interstate carrier has the right to exact a fair return for the public utilities it affords, the public is entitled to exact that no more be required of it for the use of such utilities than the services rendered are reasonably worth,²¹ and where there is a plain and irreconcilable conflict between the interest of the public and the interest of the carrier, the former must prevail.²² Thus railroads have no legal right to graduate their charges in proportion to the prosperity which attends industries whose products they transport.²³

20. *Southern Pacific Railway Co. v. Colorado Fuel & Iron Co.*, 101 Fed. 779, 42 C. C. A. 12.

21. *Tift v. Southern Railway Co.*, 138 Fed. 753.

22. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 118 Fed. 613.

23. Where a vast increase of lumber traffic had resulted in

Sec. 531. Value of goods should be considered in fixing a reasonable rate—Weight and bulk of goods.—In fixing the reasonable compensation of the carrier the element of the value of the service must be taken into account and the courts will refuse to enforce a rate which denies the carrier any remuneration for additional risk in carrying articles of the same kind and bulk, but of a higher value than the ordinary.²⁴ So the weight and bulk of the article to be transported, and the convenience or inconvenience to the carrier in transporting it, may be considered in rate making.²⁵

Sec. 532. Mileage is not the controlling factor in fixing a reasonable rate.—Mileage, while it is a circumstance which should be considered with all other facts and conditions in determining the reasonableness of interstate rates, is by no means the controlling factor.²⁶ Thus the fact that the cost of carriage of all coal upon an entire railroad system, from all points of shipment to all destinations, is a certain per cent of the gross receipts from all coal carried upon the entire system, is no reason for concluding that upon a particular line or part of the system the cost of carriage bears the same ratio to the receipts from coal carried on that particular line or part.²⁷

large increase of net revenue to the carrier, the service was inexpensive, required neither rapidity of movement nor specially equipped cars, shippers were obliged to furnish and pay for equipment, railroads were neither to load nor unload, the commodity was neither fragile nor perishable, the risk of damage was inappreciable, the industry afforded a tonnage second in magnitude to none other transported by the carrier, an arbitrary increase to points of principal destination of two cents a hundred pounds is unreasonable and unlawful. This is especially clear where the particu-

lar traffic is practically destroyed immediately after the advance is made. *Tift v. Southern Railway Co.*, 138 Fed. 753.

24. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 64 Fed. 723; *Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, 141 Fed. 1003.

25. *Interstate Commerce Commission v. Chicago Great W. Ry. Co.*, *supra*.

26. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 73 Fed. 409.

27. *Interstate Commerce Commission v. Lehigh Valley R. Co.*,

Sec. 533. On questions of reasonableness of rates, a comparison of rates is of small importance.—In determining the reasonableness of a rate, a comparison of rates to other places or points is of small importance, except as a circumstance or fact in the proof, and having no other than an evidentiary bearing.²⁸ Too many other factors must be taken into account, as, for instance, that between the same points and over the same road, a greater flow of traffic in one direction will justify a lower rate in that direction than in the other.²⁹ A finding, therefore, that the rates charged to a particular point are unreasonable in themselves cannot properly be based on evidence which only tends to show that they are high as compared with the rates charged between the initial points and intermediate points.³⁰

The above rule, of course, does not prevent consideration of other rates as evidentiary facts. Thus the rates at competitive points may be compared in determining what are reasonable rates at non-competitive points.³¹

Sec. 534. What is a reasonable rate may vary with the season of the year.—The reasonableness of rates may also be affected by the nature of the goods carried in reference to the season of the year. Thus lower summer rates and higher winter rates on some goods are not unreasonable or unlawful where such rates are necessary to keep cars employed and are offered all persons on equal terms.³²

Sec. 535. Second section of Interstate Commerce Act modeled on English Act.—The second section of the Interstate Commerce Act was modeled upon section 90 of the English “Railway Clauses Consolidation Act” of 1845, known as the

74 Fed. 784, *appeal withdrawn*, 82 Fed. 1002, 27 C. C. A. 681, 39 U. S. App. 764. *mission v. Nashville C. & St. L. Ry. Co.*, 120 Fed. 934, 57 C. C. A. 224.

28. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 72 Fed. 409. 31. *Van Patten v. Chicago, etc. R. Co.*, 81 Fed. 545.

29. See 6 Int. Com. Rep. 85, 121, and 9 Int. Com. Rep. 642. 32. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 73 Fed. 409.

30. *Interstate Commerce Com-*

“Equality Clause.”³³ That section is given in the foot-note.³⁴ The essential difference between the English and American acts lies in the fact that in the English act the words “passing only over the same line of railway under the same circumstances” occur, while in the Interstate Commerce Act a very much broader scope is given by the words “under substantially similar circumstances and conditions.” This section of the Interstate Commerce Act has been materially strengthened by the act of February 19, 1903, as amended June 29, 1906, known as the Elkins bill, which has been given in full in the notes of a preceding section.³⁵

Sec. 536. Purpose of second section.—The purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor. The phrase “under substantially similar circumstances and conditions,” as used in the

33. *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. R. 666, 40 L. Ed. 940, *reversing* 57 Fed. 948, 20 U. S. App. 6, 6 C. C. A. 653, and 52 Fed. 187.

34. *Railway Clauses Consolidation Act of 1845*, 8 & 9 Vict. ch. 20.

“Sec. 90. And whereas it is expedient that the company should be enabled to vary the tolls upon the railways so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively or unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful therefore, for the company, subject to the provisions and limitations herein and in the special act

contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect to all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway.”

35. See *ante*, § 523.

second section, refers to the matter of carriage, and does not include competition between rival routes. This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation—among which is the fact of competition when it affects rates.³⁶

Sec. 537. Effect of second section on discriminative interstate contracts.—The Interstate Commerce Act when it took effect abrogated all existing interstate contracts discriminating either for or against a shipper.³⁷ All such contracts entered into since the passage of the Interstate Commerce Act are unlawful and render the railroad company making the same liable to punishment. Being unlawful, a provision in one for a discriminative rate is utterly void between the immediate parties, and neither is permitted to go into a court of justice and enforce a demand founded thereon.³⁸ The courts have enforced this rule even where the rate has been given by mistake to the shipper, and he has been induced to ship solely on the basis of such mistaken rate.³⁹

36. *Wight v. United States*, 167 U. S. 512, 17 Sup. Ct. R. 822, 42 L. Ed. 258; *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 18 Sup. Ct. R. 45, *affirming* 74 Fed. 715, 21 C. C. A. 51, 41 U. S. App. 453, and 69 Fed. 227.

37. *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 41 Neb. 374, 59 N. W. Rep. 838. Overcharges for freight on an interstate shipment, involving unjust discrimi-

nation, made prior to the passage of the act cannot be recovered. *Gatton v. Railway*, 95 Iowa, 112, 63 N. W. Rep. 589, 28 L. R. A. 556. Prior contracts as to rebates were rendered void. *Fitzgerald v. Railroad Co.*, 63 Vt. 169, 22 Atl. Rep. 76, 13 L. R. A. 70; *Bullard v. Railroad Co.*, 10 Mont. 168, 25 Pac. 120, 11 L. R. A. 246.

38. *Church v. Railway Co.*, 14 S. Dak. 443, 85 N. W. Rep. 1001.

39. *In Railway Co. v. Hubbell*,

Sec. 538.—Discrimination must be unjust—Milling in transit agreements—Compressing cotton en route.—All special contracts or traffic arrangements between carrier and shipper are not forbidden or condemned, but only such as operate unfairly and evidence undue favoritism toward one, or de-

54 Kan. 232, 38 Pac. Rep. 266, a joint tariff rate of \$2.70 per ton on shipments of coal between Richmond, Mo., and Mankato, Kas., had been agreed on and was in force and in use by the St. Joseph, St. Louis & Santa Fe Railroad Company which operated a line from Richmond, Mo., to St. Joseph, Mo., and the Chicago, Rock Island & Pacific Railway Company which operated a connecting line from St. Joseph, Mo., to Mankato, Kas. The agent of the first named company by mistake quoted the plaintiff a rate of \$1.70 per ton on car-load shipments of coal from Richmond to Mankato. The plaintiff thereupon shipped ten car loads. The court held that a contract made by mistake can have no greater validity than one intentionally entered into, and that the Rock Island company was entitled to collect the full customary rate, there being no pretense that such rate was excessive or unreasonable.

In *Railway Co. v. Bowles*, 1 Ind. Ter. Rep. 250, 40 S. W. Rep. 899, the court held that where a rate lower than the interstate commerce rate was agreed on for a shipment from a territory to a state, but the regular rate was demanded and collected at its destination, the excess could not be recovered by the shipper, though he did not know his contract was illegal.

In *Railroad Co. v. Ostrander*, 66 Ark. 567, 52 S. W. Rep. 435, the agent of one of defendant company's connecting lines granted a rate other than the regular joint tariff rate through a mistake in classification. The court held that the regular joint tariff rate could be collected.

See also, following the same rule: *Railway Co. v. Bundick*, 94 Ga. 775, 21 S. E. Rep. 995; *Railroad Co. v. Harrison*, 119 Ala. 539, 24 So. Rep. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936; *Railway Co. v. Clements* (Tex. Civ. App.), 49 S. W. Rep. 913; *Bullard v. Railroad Co.*, 10 Mont. 168, 25 Pac. Rep. 120, 11 L. R. A. 246; *Railroad Co. v. Hefley*, 158 U. S. 99, 15 Sup. Ct. R. 802; *Railroad Co. v. Wilcox*, 99 Va. 394, 39 S. E. Rep. 144; *Railway Co. v. Mugg & Dryden*, — U. S. —, 26 Sup. Ct. R. 628.

Overruled cases, contra: *Railroad Co. v. Dismukes*, 94 Ala. 131, 10 So. Rep. 289, 17 L. R. A. 113; *Railway Co. v. Crowell Lumber & Grain Co.*, 51 Neb. 293, 70 N. W. Rep. 964.

See also *contra:* *Southern, etc., Ry. Co. v. Burgess & Co.* (Tex. Civ. App.), 90 S. W. Rep. 189; *Railway Co. v. Leatherwood*, 29 Tex. Civ. App. 507, 69 S. W. Rep. 119.

Common carriers of freight, having adopted classification sheets fixing transportation charges, and having filed the same with the In-

prive another of his just rights. So long, therefore, as there is no unjust discrimination and no stipulation in the contract forbidding the carrier extending similar rates to all other shippers similarly situated, there is no express provision of law and no sound reason arising out of public policy which prohibits a carrier entering into a fair and equitable milling in transit arrangement by which the carrier contracts to credit on the freight charges on manufactured goods any freight or raw material shipped to the factory.⁴⁰ Nor is a railroad company guilty of unlawful discrimination by receiving cotton from one shipper at a particular place of shipment, shipping it to another point and having it compressed there at the company's expense, and then reshipped to its places of destination for a rate equal to its published through rate from the place of shipment to such places of destination, where such an arrangement is in compliance with a recognized custom, of which all other shippers can avail themselves, and where it does not appear that a party complaining desires to ship any cotton from that particular place of shipment to the points of destination or that he is compelled to pay a higher rate under similar circumstances.⁴¹

Sec. 539. Shippers must be placed on an absolute equality.

—The statute recognizes the fact that it is no proper business of a common carrier to foster particular enterprises or to build up new industries, but deriving its franchise from the legislature, and depending on the will of the people for its own existence, a carrier is bound to deal fairly with the public and to put all its patrons upon an absolute equality.⁴² An agreement, therefore, by two railroads to use connecting spurs of each which terminated at docks jointly, each maintaining its own portion, makes such connecting spurs a part of the

terstate Commerce Commission, way Co., — N. Dak. —, 107
are, as well as the shippers, N. W. Rep. 56.
bound thereby; and contracts be- 40. Laurel Cotton Mills v. Rail-
tween such carriers and shippers road (Miss.), 37 So. Rep. 134.
are presumed to be governed by 41. Cowan v. Bond, 39 Fed. 54.
the classification sheet in force at 42. Railway Co. v. Goodridge,
date of shipment. Smith v. Rail- 149 U. S. 680, 13 Sup. Ct. R. 970,

entire track of each railroad, and an extra charge of \$2.00 per car, made to one shipper from a point on the docks, in addition to the published schedule of rates from the city, where no extra charge is made to any other shipper is discriminative.⁴³ So also a special rate to a shipper giving him a preference of from one to two cents a pounds on lumber over other shippers is void.⁴⁴ And the court will go behind mere forms or theories of legal entities when such forms or theories are used as cloaks to hide secret rebates, as where a so-called "transit" company is formed of certain favored shippers and the carrier pays rebates under the guise of "commissions" to such "transit" company.⁴⁵

Sec. 540. A lower through rate not necessarily discriminative.—The Interstate Commerce Act, however, does not prevent railroads from contracting for a through rate at a lower rate than the combination of the locals would aggregate. In such case, if the agent of the connecting carrier, by mistake, gives the shipper an unusually low rate over connecting lines, and the initial carrier, without knowledge of such act, misroutes the goods so that the shipper is compelled to pay a much higher rate of freight than that agreed upon, the initial carrier cannot escape liability on the ground that the rate given was in violation of the Interstate Commerce Act.⁴⁶

Sec. 541. Discrimination may be in passenger service, as well as property.—There may be unjust discrimination in passenger service, as well as property, and it is equally prohibited in both. Thus a contract entered into between a railroad company and a ticket broker whereby the latter was enabled to sell tickets to individuals over the company's lines leading from one state to another at less than the established

37 L. Ed. 896; *Railway Co. v. Ark.* 348, 50 S. W. Rep. 871.

Taggart, 149 U. S. 698, 13 Sup. Ct.

R. 777, 37 L. Ed. 905; *Ohio Coal*

Co. v. Whitcomb, 123 Fed. 359, 59

C. C. A. 487.

43. *Ohio Coal Co. v. Whitcomb*,
supra.

44. *Kizer v. Railway Co.*, 66

45. *United States v. Milwaukee,*
etc., Transit Co., 142 Fed. 247.

46. *Pond-Decker Lumber Co.*

v. Spencer, 86 Fed. 846, 30 C. C. A.

430, *reversing* *Central Trust Co. v.*
Railway Co., 81 Fed. 277.

rate for the sale of tickets by its regular agents between the same points and for the same accommodations is in violation of the Interstate Commerce Act.⁴⁷ So also a pass issued as a matter of personal favor to a person not within any of the exceptions contained in the Interstate Commerce Act is unjust discrimination.⁴⁸

Sec. 542. Reasonableness of rate not necessarily involved in section two.—The reasonableness or justice of the charge which is the subject of section one of the act is not necessarily involved in determining the unjust discrimination which is the subject matter of section two. The charge made for transporting freight may be entirely reasonable, and the plaintiff may have no occasion to complain of the intrinsic value of the services rendered, but may be injuriously affected by advantages given his competitors in rates of freight.⁴⁹

Sec. 543. A distinction exists between wholesale rates in freight and passenger traffic—Party rates.—A distinction has been recognized by the courts between wholesale rates in freight and passenger traffic. The fact that one man is a large shipper and another a small shipper does not entitle the carrier to make an appreciable difference in the rate, if the property carried in each case is of the same class, and the distance and route is the same.⁵⁰ Otherwise the large shipper would be able to sell his goods at a lower price than his competitors and this would enable him to obtain a monopoly of that business. "The same result, however, does not follow from the sale of tickets for a number of persons at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is enabled at a particular instance to

47. *Railroad Co. v. Swanson*, 102 Ga. 754, 28 S. E. Rep. 601, 39 L. R. A. 275.

48. *In re Charge to Grand Jury*, 66 Fed. 146.

49. *Kinnavey v. Terminal R. Assn.*, 81 Fed. 804.

50. *United States v. Tozer*, 39 Fed. 369. But see *Interstate Commerce Commission v. Chicago Great W. Ry. Co.*, 141 Fed. 1003.

travel at a less rate than he. If it operates unjustly to any one, it is the rival road which has not adopted corresponding rates;" but it was not the design of the act to stifle competition, nor is there any legal injustice in one person's procuring a particular service cheaper than another. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. Party rates are, therefore, not in violation of the act if they are available to the public generally.⁵¹

Sec. 544. Car-load is usually taken as the unit in fixing freight rates.—The rule in the preceding section as to wholesale freight rates, of course, must be based on some definite units for fixing freight charges, and the difficulty is to find the proper unit. Probably no fixed rule can be given, for each article of commerce should depend somewhat on itself in that respect, and due consideration should be given to its value, bulkiness, weight, etc. In general, the Interstate Commerce Commission has regarded the car-load as the unit, but has held that the difference between the rate on car-loads and less than car-loads must be reasonable.⁵²

In a pioneer Federal case, the court held that a railroad company is not required by the Interstate Commerce Act to

51. *Interstate Commerce Commission v. Baltimore, etc. R. Co.*, 145 U. S. 263, 12 Sup. Ct. R. 844, 36 L. Ed. 699, *affirming* 43 Fed. 37.

The United States government in transporting its soldiers is not entitled to the benefits of a ten-party rate ticket given by a railroad to theatrical, operatic or concert companies, glee clubs, brass or string bands, boat, baseball, polo or football teams, and other parties of like character regularly organized for the purpose of giving exhibitions and traveling together." There is no analogy or likeness between the business of the government in the transporta-

tion of its soldiers and the various classes of persons described in the company's schedules. Nor does a denial of the party rate made by such schedule amount to a violation of section 2 or 3 of the interstate commerce act. The traffic provided for in the railroad schedule has no analogy or resemblance to that carried on by the government. It is not a like service nor "under substantially similar circumstances and conditions. *United States v. Chicago & N. W. Ry. Co.*, 127 Fed. 785, 62 C. C. A. 465.

52. 9 Int. Com. Rep. 78.

give the same car-load rates on interstate shipments to forwarding agents who solicit property for shipment from different owners with less than a car-load each and combine it into car-load lots, that it makes on car-load shipments to a single owner. The higher rate demanded of the forwarding agent is not for a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."⁵³

Sec. 545. Rebate equal to cartage charges is discriminative.—The fact that a shipper has a siding connection with one railroad which enables him to get his goods delivered at his door will not authorize a competing railroad under section two, in order to obtain his business, to give him a rebate equal to the cartage charges between its station and his warehouse when other shippers over the competing railroad are compelled to pay the full charges for the same service without being allowed the rebate for cartage charges. Such a rebate is prohibited by section two as a discrimination between shippers.⁵⁴

Sec. 546. Payment of carrier's prior debt by carriage as discrimination.—Where a carrier owes a legal, enforceable, and ascertained sum of money, the Interstate Commerce Act is not violated if the debt be paid by carriage done by the carrier for its creditor at the carrier's legal freight rate.⁵⁵ But it would practically emasculate the law of its most healthful feature to permit an unexplained, indefinite and unadjusted claim for damages arising from a tort, never prosecuted to a final determination in the courts, to be put forward as an excuse for a clear discrimination in rates. To hold a defense thus pleaded to an action against the carrier

53. *Lundquist v. Railway*, 121 Fed. 915.

54. *Wight v. Railroad*, 167 U. S. 512, 17 Sup. Ct. R. 822, 42 L. Ed. 258.

55. *Interstate Commerce Commission v. Chesapeake & O. Ry. Co.*, 128 Fed. 59, affirmed and modified

in *New Haven R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, the U. S. Supreme Court holding that a claim based on an admittedly illegal prior contract could not be used in payment of the carrier's legal freight rate.

for rate discrimination to be valid would open the door to the grossest frauds upon the law and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient and to agree with the favored customer upon some fabricated claim for damages which it would be difficult, if not impossible, to disprove.⁵⁶

Sec. 547. Agreement for rebate does not void contract of carriage.—Although the fact of agreement for rebate and special rate may be proven, it does not prevent liability on the part of the carrier for loss of freight through the carrier's negligence. The law makes agreements as to rebate or special rate void, but does not make the contract of affreightment otherwise void. There is nothing in the law or the policy of it which requires a construction that would excuse a carrier from all liability when it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for freight.⁵⁷

Sec. 548. Effect of section two on limitations on the value of the goods placed in bills of lading.—A limitation placed by the shipper on the value of the goods, if lost or damaged in transit, in consideration of a reduced rate being given on an interstate shipment, is in violation of section two and void. If there is but one rate or charge permissible for one class of freight under the act, then such a thing as a rate "less than the regular rate" is prohibited and the carrier ought not to be permitted to plead the violation of law as a defense to liabilities incurred in the line of its duty as a common carrier under the law. To say that a rate "less than the regular rate" was made in consideration that the shipper placed a

56. *Railway Co. v. Goodridge*, North America, 151 U. S. 368, 14 149 U. S. 680, 13 Sup. Ct. R. 970, Sup. Ct. 367, 38 L. Ed. 195, *affirmed*, 37 L. Ed. 896; *Railway Co. v. firming Insurance Co. of North Taggart*, 149 U. S. 698, 13 Sup. Ct. America *v. Delaware Mutual R. 977*, 37 L. Ed. 905. *Safety Insurance Co.*, 91 Tenn. 537,

57. *Merchants Cotton Press & Storage Co. v. Insurance Co. of* 19 S. W. Rep. 755.

reduced valuation upon the property shipped does not put the contract of shipment without the prohibition of the act, but simply illustrates how, by the mere subterfuge of a reduced valuation clause, inserted in shipping contracts, classes innumerable might be established and the whole scheme of uniformity in charge contemplated in the Interstate Commerce Act be nullified. If the simple suggestion of a diminished valuation of a designated article or class of property to be shipped would work for it a new rule in the schedule of charges required to be printed or hung up to public view in the depot or station house of the transportation company, the provisions of the law forbidding reductions, as well as advances in the rate charges, except after public notice, would mean nothing; and new schedules arranged and classes formed to suit every special friend of the company or favored locality applying for transportation rates would be the practice, as before the enactment of the law. Special contract rates and scheduled rates, or rates determinable by definite and published rules, cannot be reconciled one with the other.¹

Sec. 549. Question of relative rates is involved in section two.—In questions of unreasonableness of rates arising under section one, we have seen that a comparison of rates is of little importance. In determining questions under section two, however, it often, if not always, becomes necessary to contrast the rates to other places and persons, for objections under that section involve the question of relative rates with all their elements.²

Sec. 550. Failure to pay expenses no excuse for unjust discrimination under section two.—The fact that a line, operated as a part of a great railroad system, considered as a separate railroad, fails to pay its expenses, does not justify an unjust discrimination in rates. There are many such roads absorbed by the principal railway systems of the country,

1. *Ward v. Railway*, 158 Mo. 226, 58 S. W. Rep. 28; *Griffin v. Louisville & N. R. Co.*, *Wabash R. Co.*, — Mo. App. —, 73 Fed. 409.
91 S. W. Rep. 1015.

and, if this contention were allowable, it would in the great majority of cases involving unfair and prejudicial rates effectually nullify the Interstate Commerce Law.³

Sec. 551. Third section of Interstate Commerce Act modeled on English Act—Their differences.—The third section of the Interstate Commerce Act was modeled upon the second section of the English “act for the better regulation of the traffic on railways and canals” of July 10, 1854,⁴ and the eleventh section of the act of July 21, 1873, entitled “An Act to make better provision for the carrying into effect of Railway and Canal Traffic Act, 1854, and for other purposes connected therewith.”⁵ As its title implies, the latter act does

3. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 118 Fed. 613.

4. Act for the better regulation of the traffic on railways and canals of July 10, 1854. 17 & 18 Vict. Ch. 31.

“Sec. 2. Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving, and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway

company and canal company, and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arising by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be afforded to the public desirous of using such railways or canals, or railways and canals as a continuous line of communication, and so that all reasonable accommodations may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.” See *Pickering, Phipps & Co. v. Railway*, 2 Q. B. (1892) 229.

5. 36 & 37 Vict. Ch. 48.

not repeal the former, but merely adds specific provisions for its better enforcement.

It should also be noticed in this connection that the English act does not contain the word "locality," which marks an important difference between the English and American acts. The word "locality," however, does not make it competent for a railroad company to appropriate the grievance of a traffic or locality under section three, and to complain on account of it.⁶

Sec. 552. Section three is more comprehensive than section two.—Unjust discrimination is prohibited by section three as well as by section two. The latter relates to unjust discrimination in rates; the former is comprehensive enough standing alone to include every form of unjust discrimination, not only in rates, but also in the conveniences and facilities supplied to shippers in any of the details of the carrying service.⁷ The same rule holds good as to section three, therefore, that obtains as to section two, viz., that a charge may be perfectly reasonable under section one of the act and may create an unreasonable preference or advantage under section three.⁸ The question of relative rates would also arise under section three, as under section two.⁹

Sec. 553. Questions of undue or unreasonable prejudice or preference are questions of fact.—As the third section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice

6. Oregon Short Line, etc. Ry. Co. v. Railroad Co., 61 Fed. 158, 9 C. C. A. 409, 15 U. S. App. 479, affirming 51 Fed. 465.

7. United States v. Delaware, etc. R. Co., 40 Fed. 101; Interstate Commerce Commission v. Chicago Great W. Ry. Co., 141 Fed. 1003.

8. Interstate Commerce Commission v. Baltimore, etc., R. Co., 145 U. S. 263, 12 Sup. Ct. R. 844, 36 L. Ed. 699, affirming 43 Fed. 37.

9. Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. 409.

or preference is a question of fact depending on the matters proved in each case,¹⁰ the carrier's business involving so many considerations that each case must be treated broadly and practically by itself.¹¹ And in determining whether the rates charged by a railroad company to and from a city are unjust and unreasonable in themselves, the greatest weight should be given to the following considerations: The opinion of expert witnesses; the effect of the rates charged on the growth and prosperity of the city; the cost of transportation as compared with the rates charged, and the rates in force at numerous other cities, where the circumstances are as nearly similar as may be to those prevailing at such city.¹²

Sec. 554. Origin of goods immaterial under section three.

—All goods offered for shipment at a certain point must be carried at the established rate for such goods from such point, regardless of the place where they originated. To hold otherwise would be to subject the shipper whose goods originated at points other than the place of shipment and the locality from which he got his goods to an undue and unreasonable disadvantage.¹³

Sec. 555. Carriage of articles or commodities manufactured, mined or produced by carrier—Section three applies to carriage of timber and manufactured products thereof which are excepted by section one.—Under section one of the Interstate Commerce Act, as amended June 29, 1906, "from and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber

10. Interstate Commerce Commission *v.* Louisville & N. R. Co., 73 Fed. 409.

Co., 168 U. S. 144, 18 Sup. Ct. R. 45, 42 L. Ed. 414, *affirming* 74 Fed. 715, 21 C. C. A. 51, 41 U. S. App. 453 and 69 Fed. 227; Interstate Commerce Commission *v.* Chicago Great W. Ry. Co., 141 Fed. 1003.

12. Interstate Commerce Commission *v.* Southern R. Co., 117 Fed. 741, *affirmed*, 122 Fed. 800, 60 C. C. A. 540.

13. Bigbee & Warrior River's Packet Co. *v.* Railroad Co., 60 Fed. 545.

11. Interstate Commerce Com-

and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." It should be noticed in the first place that this provision only applies to railroad companies and not to the other carriers who are now brought within the scope of the act. But, on the other hand, it should also be noticed that the language of the third section is so broad that it applies to all carriers within the scope of the act and all classes of commodities carried by them, and by becoming a vendor of the articles carried, the carrier does not escape its inhibitions. While under the provisions of section one all carriers may become dealers in certain excepted articles of transport, or carriers other than railroad companies may become dealers in all articles of transport, and can sell and consequently can contract to sell such articles at a price which pays, or practically pays, the cost items and its own published freight charges, yet, whenever the cost items so substantially rise that the loss to the carrier as a dealer and the subsequent advantage to the purchaser consignee, or the disadvantage to some one else, becomes unreasonable or undue, such sales become, or such contract becomes, illegal. When such a state of facts come to exist, the carrier must plead the illegality of the transaction and cease to perform. It is not an answer to say that the losses of the carrier dealer may be treated as losses on its account as dealer. If there is a substantial loss, no matter to which of the carrier's accounts it is charged, there is either an advantage to the purchaser, or a disadvantage to some one else, equal to this. In the event that the carrier refuses to cease to perform such a contract, its further performance will be enjoined.¹⁴

14. *New Haven R. R. Co. v. Interfirming Interstate Commerce Com-*
mission v. Chesapeake and Ohio
200 U. S. 361, *modifying and af-* *Ry. Co.*, 128 Fed. 59; *Interstate*

So it may be conceded that it is competent for a railroad company to so adjust its rates as to promote its legitimate interest, and, in so doing to build up to a reasonable degree a seaport on its own line at the expense of another port on another line, but it cannot, with this purpose, adopt rates excessive in themselves, unduly preferential to its own port and unduly prejudicial to another port.¹⁵

Sec. 556. Discrimination in carriage of live stock and affording proper facilities under section three.—As incidental to its business of transporting cattle, a railroad company must provide the means of loading, unloading, and caring for such freight, and it cannot be said that a carrier is giving an undue or unreasonable preference to itself or subjecting a neighboring carrier to an undue and unreasonable disadvantage if it insists on delivering live stock which it has carried to the end of the transit at its own yard. The fact that the neighboring carrier's stock yards are public does not change the case.¹⁶ In the case of shippers it was held under the old Interstate Commerce Act that a railroad company was under no obligation to furnish appliances for receiving and delivering live stock at every point on its line where persons engaged in buying, selling, or shipping live stock chose to establish stock yards. It could, if it chose, select the yards of a particular stock yards company to deliver and receive cattle at that point at its station without any yardage charge or fee for the proper loading and unloading of live stock or without any fee for a reasonable time after the cattle were delivered from the cars. After that reasonable time had expired the question of holding the live stock was one between the stock yards company and consignee, and did not concern the carrier. It had done its duty in giving the consignee a reasonable opportunity to take the cattle away from the yards with-

Commerce Commission *v.* Baird,
194 U. S. 25, 48 L. Ed. 860.

15. Interstate Commerce Commission *v.* Louisville & N. R. Co.,
118 Fed. 613.

16. Central Stockyards Co. *v.* Railroad, 192 U. S. 568, 48 L. Ed. 565, 24 Sup. Ct. R. 339, *affirming* 118 Fed. 113, 55 C. C. A. 63.

out charges or fees.¹⁷ This last decision must now be read, however, with the qualification contained in the first section of the amendatory act of June 29, 1906, that "any common carrier subject to the provisions of this act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper."

Although the charge for caring for cattle at the points of departure or destination is usually included in the transportation charge, in the nature of things, there is no reason why, if the public convenience be subserved thereby, the compensation may not be apportioned so that so much may be paid for the loading and the hauling and so much for the unloading and the care of the animals pending delivery.¹⁸ When the charges are so divided, however, and the means for unloading and delivery of cattle have been provided by the consignee himself at a convenient point on its line of road, a railroad company may not refuse to make such delivery for the sole and only purpose of compelling such consignee to pay a charge fixed by the company in response to its obligation to provide the means of unloading for consignees who must, necessarily, require that service.¹⁹

It often happens that a railroad company is bound by its contract of carriage to deliver cattle at stock yards off its own line, by transporting them over a line belonging to the

17. *Butchers & Drovers' Stock Yards Co. v. Railroad*, 67 Fed. 35, 64 Fed. 992.

14 C. C. A. 290, 31 U. S. App. 252. 19. *Covington Stock Yards v.*

18. *Walker v. Keenan*, 73 Fed. Keith, 139 U. S. 128.
755, 19 C. C. A. 668, 34 U. S. App.

stock yards company. In such case it is immaterial whether the railroad company has facilities of its own for delivering cattle at any other place than the stock yards, because even if such other facilities exist they would not be used under the contract. Hence the railroad company is not bound in default of such facilities to deliver at the stock yards without a separate charge and may, on posting schedules as required by the Interstate Commerce Act, make a through charge for the cattle and a separate reasonable terminal charge for delivery at the stock yards.²⁰

Sec. 557. Discrimination in coal car distribution under section three.—Under section three of the Interstate Commerce Act, in furnishing cars to coal mines along its line, it is the duty of a railroad company to so manage its business with all the mines located on and shipping coal over its line in the same relative and impartial way, so as to show no favoritism to either one of them; thereby exercising the power and discretion confided to it, so as not to act in a manner, the result of which would necessarily build up one at the expense of the others, or advance the interest of two to the detriment of a third. In reaching a proper basis for the distribution of railroad cars it is necessary that an impartial and intelligent study of the capacity of the different mines be made by competent and disinterested experts, whose duty it should be to carefully examine into the different elements that are essentially factors in the finding of the daily output of the respective mines which are to share in the allotment. Among the matters to be investigated are the following: The working places, the number of mine cars and their capacity, the switch and tipple efficiency, the number and character of the mining machines in use, the hauling system and the power used, the number of miners and other employes, the mine openings and the miner's houses. No one of these various and essential elements can safely be said to be absolute-

²⁰ Interstate Commerce Com- 46 L. Ed. 1182, *affirming* 103 Fed. mission v. Chicago, Burlington & 249, 43 C. C. A. 209 and 98 Fed. Quincy R. R. Co., 186 U. S. 320, 173.

ly controlling, though likely the most important of them all are the real working places, the available points at which coal can be profitably mined. The equipment is of secondary importance, as that can be readily replaced or increased.²¹ And while the capacity of a shipper of coal may be greater than his allotment of cars, yet, when such is also the case with every other operator similarly situated in the coal field, it is the duty of the railroad company, when the supply of coal cars is short, to pro-rate the supply on hand, without unjust discrimination among all the operators, including the shipper in question.²²

When mines have been working for some time, not to the limit of their capacity, but on an output based on a restricted allotment of railroad cars, and a new inspection is taken from which to make the distribution of railroad cars for future use, because of changed conditions, then such previous facts and the results naturally following therefrom should be noted with discernment before the maximum capacity of such mine for future output is announced. If this is not done, the mine is apt to be discriminated against, even though such was not intended, and mines where such conditions did not exist will, under the new allotment, develop themselves much faster than the mine which had theretofore been restricted in its output. If the railroad management withholds cars from a mine, it thereby, to a certain extent, retards its development, while, on the other hand, if such management discriminates in favor of a mine by allowing more cars than its proper rating entitles it to, the result is the rapid and abnormal development of that mine, to the prejudice of those competing with it. It is, therefore, evident that if equitable rules are not observed, the power that controls the railroad car supply

21. *United States v. Railroad Co.*, 125 Fed. 252, *affirmed*, 134 Fed. 198, 67 C. C. A. 220.

An agreement between the railroad company and shippers fixing a basis for coal car distribution in a certain field does not do

away with the obligations of the railroad company as to distribution under section three. *United States v. Norfolk & Western Ry. Co.*, — C. C. A. —, 143 Fed. 266.

22. *United States v. Railway*

can foster one mine at the expense of another, or can build up one locality while it is tearing down another.²³

This duty of a railroad company to allot cars without unjust discrimination among coal shippers cannot be altered by the furnishing of special cars to the railroad company by one shipper, to be used exclusively in the transportation of coal for that shipper, whether the cars are sold by the shipper to the railroad company on the installment plan, or the shipper retains title to the cars. If the cars are purchased from the shipper by the railroad company on the installment plan, the company thereby becoming interested at once, and finally the absolute owner thereof, then, in the event of an exclusive application of the same to the business of that shipper, there never would be a time, from first to last, during which the railroad company, by such a course, would not be devoting rolling stock which it owns, or in which it is interested as a common carrier, to the demands of one shipper to the exclusion of others similarly situated, which it may not do; or, even if it should never become interested in, or the owner of the cars, still it may not rent its tracks or permit them to be appropriated by any one to the detriment of other shippers whom it should serve to the uttermost; and in the stress of unusual business such special cars in its service would have to be applied to the accommodation of all shippers alike.²⁴

Sec. 558. Third section applies as well to passenger as to freight traffic.—The inhibitions of the third section apply, of course, as well to passenger as to freight traffic. A railroad company cannot, therefore, discriminate against passengers who purchase tickets outside a state on its own road by refusing to stop at a station for them where it stops its trains to let off passengers who purchase tickets over other roads outside the state.²⁵

Co., 109 Fed. 831, *s. c.*, 114 Fed. 683.

23. *United States v. Railroad Co.*, 125 Fed. 252, *affirmed*, 134 Fed. 198, 67 C. C. A. 220.

24. *United States v. Railway Co.*, 109 Fed. 831, *s. c.* 114 Fed. 683.

25. *Railway Co. v. Moore* (Tex. Civ. App.), 80 S. W. Rep. 426.

Sec. 559. Real and substantial competition justifies dissimilarity in rates.—It has been said by the Supreme Court of the United States that the only principle by which it is possible to enforce the whole statute is the construction adopted in its opinions; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstances and conditions provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination against it.²⁶ Thus the fact that low rates are made in a “trunk line territory” in which very active competition exists on through shipments from Chicago and other western points to Norfolk and Richmond, Va., while substantially the local rates are charged on the same lines on through shipment from the same points to Wilmington, N. C., which is not in the “trunk line territory” and has less active competition, does not give Norfolk and Richmond an undue or unreasonable preference or advantage, or subject Wilmington to an undue or unreasonable prejudice or disadvantage in violation of section three.²⁷ The advantageous position of a trader at a competitive point is as much a circumstance to be taken into consideration as the geographical position of another trader

26. *East Tennessee, Virginia & Georgia Ry. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. R. 516, reversing *Id.*, 99 Fed. 52, 39 C. C. A. 413, and *Interstate Commerce Commission v. East Tennessee, etc. Ry. Co.*, 85 Fed. 107; *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 18 Sup. Ct. R. 45, 42 L. Ed. 414, affirming 74 Fed. 715, 21 C. C. A. 51, 41 U. S. App. 453 and 69 Fed. 227. See also, *Interstate Commerce Commission v. Louisville & N. R. Co.*, 73 Fed. 409; *Interstate Commerce Commission v. Chicago Great W. Ry. Co.*, 141 Fed. 1003.

27. *Interstate Commerce Commission v. Cincinnati, P. & V. Railroad*, 124 Fed. 624.

at a nearer non-competitive point.²⁸ Whether the competition at one point is controlling is a question of fact.²⁹

Sec. 560. Third section does not relate to acts, the result of conditions beyond control of carrier.—When upon an issue as to a violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is shown that the lesser rate charged for the long haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the carriers, and as a consequence the provisions of the third section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply. The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts which are the result of conditions wholly beyond the control of such carriers. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it cannot be that the availing of this right is the cause of the preference.³⁰

28. *Interstate Commerce Commission v. Louisville & N. Railroad Co.*, 73 Fed. 409; *Allen v. R. & Nav. Co.*, 106 Fed. 265, s. c., 98 Fed. 16.

29. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 73 Fed. 409.

30. *East Tennessee, Virginia & Georgia Railway Company v. Interstate Commerce Commission*,

181 U. S. 1, 45 L. Ed. 719, 21 Sup. Ct. R. 516, *reversing Id.*, 99 Fed. 52, 39 C. C. A. 413 and *Interstate Commerce Commission v. East Tennessee, Virginia & Georgia Railway Company*, 85 Fed. 107; *Interstate Commerce Commission v. Chicago Great W. Ry. Co.*, 141 Fed. 1003.

The same evidence which warrants a finding that dissimilar cir-

Sec. 561. Competition may be between railroads.—The competition usually dealt with in reference to railroads is that of one railroad with another, and in that connection it has been held that undue discrimination may result from the suppression of competition at a particular point by an agreement or combination of the carriers.³¹ But the acquisition of one competitive road by another does not affect the question of unjust discrimination at a non-competitive point, where it affirmatively appears that the rates at the non-competitive point have not been increased since the purchase of the competing road.³²

Sec. 562. Competition of ocean lines should be taken into consideration.—There formerly was some question as to whether the competition of ocean lines should be taken into consideration in determining whether a dissimilarity of circumstances and conditions existed within the meaning of the act. This question has now been definitely settled by the Supreme Court of the United States in the affirmative; and the fact that the proportion of a through rate allowed for the carriage from the port of entry to the destination may be less than the rate scheduled for freight originating at the same place, and carried to the same destination, does not necessarily render the lesser rate unlawful.³³

cumstances and conditions exist 988, 46 C. C. A. 685, *reversing* 102
which justify a lower rate for a Fed. 709 and 101 Fed. 146.

longer haul to one point than for a 32. Interstate Commerce Com-
shorter haul to another also estab- mission v. Southern Railway Co.,
lishes that the charging of such 117 Fed. 741, *affirmed*, 122 Fed.
rates does not give one point an 800, 60 C. C. A. 540.

undue preference and advantage 33. Texas & Pacific Railway Co.
over the other in violation of sec- v. Interstate Commerce Commis-
tion three. Interstate Commerce sion, 162 U. S. 197, 16 Sup. Ct. R.
Commission v. Nashville, C. & St. 666, 40 L. Ed. 940, *reversing* In-
L. Railway Co., 120 Fed. 934, 57 terstate Commerce Commission v.
C. C. A. 224. Texas & Pacific Railway Co., 57

31. Interstate Commerce Com- Fed. 948, 6 C. C. A. 653, 20 U. S.
mission v. Louisville & N. R. Co., App. 6, and *Id.* 52 Fed. 187; Rail-
190 U. S. 273, 47 L. Ed. 1047, 23 road Co. v. Redding, 17 Tex. Civ.
Sup. Ct. R. 687, *affirming* 108 Fed. App. 440, 43 S. W. Rep. 1061.

Sec. 563. Interests of shipper, carrier and public should be considered.—In passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are to be delivered is to be considered as well as that of the communities which are in the locality of the place of shipment.³⁴ That “there may be cases where the carrier cannot be allowed to avail of the competitive condition because of the public interests and the other provisions of the statute, is, of course, clear. What particular environment may in every case produce the result cannot be in advance indicated. But the suggestion of an obvious case is not inappropriate. Take a case where a carrier cannot meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation and, therefore, without bringing about a deficiency which would have to be met by increased charges on other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency towards unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places.”³⁵

Sec. 564. Rules as to competition summarized.—“While the carrier may take into consideration the existence of com-

34. *Texas & Pacific Railway Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. R. 666, 40 L. Ed. 940, reversing *Interstate Commerce Commission v. Texas & Pacific Railway Co.*, 57 Fed. 948, 6 C. C. A. 653, 20 U. S. App. 6, and *Id.* 52 Fed. 187; *Interstate Commerce Commission v. Louisville & N. R. Co.*, 73 Fed. 409.

35. *East Tennessee, Virginia & Georgia Railway Company v. Interstate Commerce Commission*,

petition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First, the absolute command of the statute that all rates shall be just and reasonable, and that no undue discrimination be brought about though, in the nature of things, this latter consideration may in many cases be involved in the determination of whether competition was such as created a substantial dissimilarity of condition. Second, that the competition relied upon be not artificial or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate making, the right in every event to be enjoyed with a due regard to the interests of the public, after giving full weight to the benefits to be conferred on the place from which the traffic moved as well as those to be derived by the locality to which it is to be delivered.'³⁶

Sec. 565. Condition that initial carrier shall have right to route beyond its own terminal is valid.—Although the Interstate Commerce Commission now has the power under certain conditions to form through routes and fix the maximum joint rates, unless those conditions exist which justify the use of that power by the commission, it is still a matter for each carrier to determine for himself whether he will enter into a contract with other carriers for through transportation, through joint traffic, through billing and division of through freight, and the right to select from two or more connecting carriers one which he will employ as the agency by which he will send freight beyond his own lines on through bills of lading, or as his agent to receive freight and transmit it on through bills of lading to his own lines, and without breaking bulk, is not taken away by the Interstate Commerce Act.³⁷

181 U. S. 1, 45 L. Ed. 719, 22 Sup. L. Ed. 309, *reversing* Behlmer v. Ct. 516, *reversing* *Id.*, 99 Fed. 52, Railroad Co., 83 Fed. 898, 28 C. C. 39 C. C. A. 413, and Interstate A. 229, 42 U. S. App. 581, and Commerce Commission v. East *modifying* 71 Fed. 835. Tennessee, etc. Railway Company, 37. Railway Co. v. Miami Steamship Co., 86 Fed. 407, 30 C. C. A. 85 Fed. 107.

36. Railroad Co. v. Behlmer, 175 142; Prescott & A. C. R. Co. v. U. S. 648, 20 Sup. Ct. R. 209, 44 Atchison, etc. Ry. Co., 73 Fed.

So, subject to that same power of the commission, a joint through rate coupled with the condition that the initial carrier shall have the absolute right to route beyond its own terminal is valid.³⁸ But it must always be remembered that if such through routes and joint tariffs are voluntarily established by the carriers themselves, the carriers cannot attach thereto a condition which subjects any particular person or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever.³⁹

Sec. 566. Joint rate is not a basis for local rate.—A joint rate by two railroads does not furnish a basis upon which either company would be bound to adjust its own local tariff.⁴⁰ The mere fact that the disparity between the through and the local rates is considerable does not, of itself, warrant the court in finding that such disparity constitutes an undue discrimination—much less does it justify the court in finding that the entire difference between the two rates is undue or unreasonable, especially when there is no person, firm or corporation complaining that he or they are aggrieved by such disparity.⁴¹ Nor does the fact that the portion of a through rate received by one of several railroads transporting the goods as interstate commerce may be less than its own local rate constitute a case of undue discrimination against a local shipper. The court cannot take cognizance of the proportion in which freight earned by connecting railroads under a joint tariff schedule is divided between them.⁴²

438, *appeal dismissed*, 84 Fed. 214, 28 C. C. A. 481, 51 U. S. App. 599.

38. *Southern Pacific Company v. Interstate Commerce Commission*, 200 U. S. 536, *reversing* 132 Fed. 829 and 137 Fed. 606.

39. *Interstate Commerce Commission v. Southern Ry. Co.*, 123 Fed. 597.

40. *United States v. Mellen*, 53 Fed. 229; *Tozer v. United States*, 52 Fed. 917.

41. *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. R. 666, 40 L. Ed. 940, *reversing* *Interstate Commerce Commission v. Texas & Pacific Ry. Co.*, 57 Fed. 940, 6 C. C. A. 653, 20 U. S. App. 6, and *Id.*, 52 Fed. 187.

42. *Parsons v. Railway*, 167 U. S. 447, 42 L. Ed. 231, 17 Sup. Ct. R. 887, *affirming* 63 Fed. 903, 11 C. C. A. 489, 27 U. S. App. 394; *Al-*

Sec. 567. Requiring prepayment of freight by connecting carrier is not unjust discrimination.—At common law a railroad corporation has the right to require the prepayment of freight charges by all its customers or some of them, as it may think best. It has the same right as any other individual or corporation to exact payment for a service before it is rendered, or to extend credit. This common-law right of requiring payment in advance of some customers and of extending credit to others, has not been taken away by the Interstate Commerce Act, nor does an interstate carrier subject another to an unreasonable or undue disadvantage because it exacts of that carrier the prepayment of freight on all property received by it at a given station, while it does not require charges to be paid in advance on freight received from other individuals and corporations at such station.⁴³

Sec. 568. Duty to afford equal facilities for interchange of traffic.—The Interstate Commerce Law does not require an interstate carrier to treat all other carriers in precisely the same manner without reference to its own interests. Some play is given in the act to self-interest, and the clause which requires carriers “to afford all reasonable, proper and equal facilities for the interchange of traffic” does not require that such “equal facilities” shall be afforded under dissimilar circumstances and conditions. Moreover the direction “to afford equal facilities for an interchange of traffic” is controlled and limited by the proviso that the clause “shall not be construed as requiring a carrier to give the use of its tracks or terminal facilities to another carrier.”⁴⁴ Thus it

len v. R. & Nav. Co., 98 Fed. 16, *affirming* 51 Fed. 465; Railway s. c. 106 Fed. 265. Co. v. Miami Steamship Co., 86

43. Little Rock & M. R. Co. v. Fed. 407, 30 C. C. A. 142.
St. Louis S. W. Ry. Co., 63 Fed. 44. Little Rock & M. R. Co. v.
775, 11 C. C. A. 417, 27 U. S. App. St. Louis S. W. Ry. Co., 63 Fed.
380, 26 L. R. A. 192, *affirming* 59 775, 11 C. C. A. 417, 27 U. S. App.
Fed. 400; Oregon Short Line, etc. 380, 26 L. R. A. 192, *affirming* 59
Ry. Co. v. Railroad, 61 Fed. 158, Fed. 400; Kentucky & I. Bridge
9 C. C. A. 409, 15 U. S. App. 479, Co. v. Louisville & N. R. Co., 37

has been held that the third section of the Interstate Commerce Act does not require an interstate carrier to receive freight in the cars in which it is tendered by a connecting carrier, and to transport it in such cars, paying a mileage rate thereon, when it has cars of its own that are available for the service and the freight will not be injured by transfer.⁴⁵ So a railroad is under no obligation to build up a rival's business by giving its rival the same facilities enjoyed by a branch of its own and operated by it, nor does the Interstate Commerce Act forbid its preferring a road with through facilities to one with only local facilities, a road that goes all the way to one going only part of the way.⁴⁶ But if the defendant company is a separate independent company from the favored one, owning no stock therein, neither having built, bought nor leased it, conducted its business, nor received its earnings, a mere contract between the two companies for the interchange of traffic will not have the effect to make one line an extension of the other, nor relieve the defendant company from fulfilling its obligations to roads which connect physically with itself. In order to be otherwise, the union of the combined lines must be of such a character that one has practically become the property of the other.⁴⁷

The question of the existence of discrimination and of an actionable refusal of equal facilities is to be ascertained by applying all the considerations of equity affecting the case, and should be found to exist only when such facilities can be afforded "under substantially similar circumstances and conditions," but there is nothing in the act which makes mere distance between connecting points, whether a furlong, a mile, or ten, or twenty, controlling of that question.⁴⁸

Fed. 571; *Oregon Short Line, etc.* 47 Fed. 771, *appeal dismissed*, 159 Ry. Co. v. Northern Pac. R. Co., 51 U. S. 698.

Fed. 465, 473.

47. *New York & N. Ry. Co. v.*

45. *Oregon Short Line, etc. Ry.* *New York & N. E. R. Co.*, 50 Fed. Co. v. Northern Pac. R. Co., 51 867.

Fed. 465, 474.

48. *New York & N. Ry. Co. v.*

46. *Little Rock & M. R. Co. v.* *New York & N. E. R. Co.*, *supra*.
East Tennessee. V. & G. R. Co.,

A transportation company engaged in interstate carriage of property partly by railroad and partly by water is not obliged to allow the boats of a competitor to land at its wharf. A railroad company cannot combine with its proper business a business not cognate to it and discriminate in favor of itself, but this principle does not extend to boats owned by a railroad as part of a continuous line.⁴⁹

Sec. 569. Question of similarity or dissimilarity of circumstances under section four is one of fact.—As the fourth section of the Act, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer distance over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity or dissimilarity of circumstances shall consist, the question as to whether the circumstances and conditions of the carriage have been substantially similar, or otherwise, is a question of fact depending on the matters proved in each case.⁵⁰ In deciding what circumstances and conditions may be proved in each case, however, the Supreme Court of the United States has practically eliminated the fourth section from the Act.

Sec. 570. Real and substantial competition a factor under section four.—It has been decided by the Supreme Court of the United States that all competition, provided it possesses the attribute of producing a substantial and material effect upon traffic and rate making, is proper, under the statute, to be taken into consideration. Especially is this true where the

^{49.} *Ilwaco Ry. & Nav. Co. v. Oregon Short Line & U. N. Ry. Co.*, 57 Fed. 673, 6 C. C. A. 495, 15 U. S. App. 173. The commission, therefore, has no power to declare that the rate for a shorter distance shall not exceed three-fourths of the rate for a longer distance over the same road, thereby assuming to establish a rate by relation. *South-
ern Pacific Co. v. Colorado Fuel & Iron Co.*, 101 Fed. 773, 42 C. C. A. 12.

^{50.} *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 18 Sup. Ct. R. 45, 42 L. Ed. 414, *affirming* 74 Fed. 715, 21 C. C. A. 51, 41 U. S. App. 453 and 69 Fed. 227.

competitor is a carrier by water, because that is the cheapest known kind of transportation, and is unrestricted by law. But the same rule is also true where the competition is wholly between carriers who are subject to the Act. And where competition exists, a carrier subject to the Act has a right of his own motion to take it into view in fixing rates to the competitive point.¹ If the rates charged by a railroad to a particular point, therefore, are not unreasonable in themselves, the fact that lower rates are charged for a longer haul to other points does not create an unjust discrimination against such point, in violation of the Interstate Commerce Act, where such lower rates are due to active legitimate competition.²

Sec. 571. "Basing Point System" is not illegal under section four.—It having been established that competition af-

1. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 190 U. S. 273, 23 Sup. Ct. R. 687, 47 L. Ed. 1047, *affirming* 108 Fed. 988, 46 C. C. A. 685, *reversing* 102 Fed. 709 and 101 Fed. 146; *Interstate Commerce Commission v. Clyde Steamship Co.*, 181 U. S. 29, 21 Sup. Ct. R. 512, 45 L. Ed. 729, *modifying* *Interstate Commerce Commission v. Western & A. R. Co.*, 93 Fed. 83, 35 C. C. A. 217, and 88 Fed. 186; *East Tennessee, Virginia & Georgia Railway Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. Ed. 719, 22 Sup. Ct. R. 516, *reversing* 99 Fed. 52, 39 C. C. A. 413 and *Interstate Commerce Commission v. East Tennessee, etc. Ry. Co.*, 85 Fed. 107; *Railroad Co. v. Behlmer*, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. Ed. 309, *reversing* *Behlmer v. Railroad*, 83 Fed. 898, 28 C. C. A. 229, 42 U. S. App. 581, and *modifying* *Id.*, 71 Fed. 835; *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 18 Sup. Ct. R. 45, 42 L. Ed. 414, *affirming* 21 C. C. A. 51, 74 Fed. 715, 41 U. S. App. 453 and *Id.* 69 Fed. 227; *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. R. 666, 40 L. Ed. 940, *reversing* *Interstate Commerce Commission v. Texas & Pacific Ry. Co.*, 57 Fed. 948, 6 C. C. A. 653, 20 U. S. App. 6 and *Id.*, 52 Fed. 187; *Interstate Commerce Commission v. Southern Ry. Co.*, 122 Fed. 800, 60 C. C. A. 540, *affirming* 117 Fed. 741; *Interstate Commerce Commission v. Southern Ry. Co.*, 105 Fed. 703; *Brewer v. Railway Co.*, 84 Fed. 258; *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 50 Fed. 295, *appealed dismissed* 81 Fed. 1005, 29 U. S. App. 746, 26 C. C. A. 685.
2. *Interstate Commerce Commission v. Southern Ry. Co.*, 122 Fed. 800, 60 C. C. A. 540, *affirming* 117 Fed. 741; *Brewer v. Railway*,

fecting rates existing at a particular competitive point produces the dissimilarity of circumstances and conditions contemplated by the fourth section of the act, it inevitably follows that the railway companies have a right to take the lower rate prevailing at that competitive point as a basis for the charge made to non-competitive places in territory contiguous to the competitive point, and to ask in addition to the low competitive rate the local rate from the competitive point to such non-competitive places, provided thereby no increased charges result over those which would have been occasioned if the low rate to the competitive point had been left out of view.³ This result practically eliminates the fourth section, at least so far as territory immediately contiguous to the competitive points is concerned. The Court of Appeals of Kentucky, and rightly, in construing a clause in its state statute similar to the fourth section of the Interstate Commerce Act refused to follow the Supreme Court of the United States and criticised the above rule sharply.⁴

Sec. 572. Competition must not be conjectural.—A nearer but non-competitive point is not entitled to the same rate as a competitive point farther away on the same line merely because a combination of carriers might, if they chose, bring about competition at the non-competitive point equivalent to the competition existing at the competitive point. The substantial dissimilarity of circumstances and conditions provided by the Act must depend upon a real and substantial competition at a particular point affecting rates, not upon the mere possibility of the arising of such competition. To hold otherwise would be to destroy the whole effect of the Act and cause every case where competition was involved to depend, not upon the fact of its existence as affecting

84 Fed. 258; Interstate Commerce Commission *v.* Atchison T. & S. F. R. Co., 50 Fed. 295, *appeal dismissed*, 81 Fed. 1005, 29 U. S. App. 746, 26 C. C. A. 685. 47 L. Ed. 1047, *affirming* 108 Fed. 988, 46 C. C. A. 685, *reversing* 102 Fed. 709 and 101 Fed. 146.

3. Interstate Commerce Commission *v.* Louisville & N. R. Co., 190 U. S. 273, 23 Sup. Ct. R. 687, 4. Louisville & N. R. Co. *v.* Commonwealth, 106 Ky. 633, 51 S. W. Rep. 164, 21 Ky. L. Rep. 232, 90 Am. St. Rep. 236.

rates, but upon the possibility of its arising. What the fourth section of the act to regulate commerce has reference to is an actual dissimilarity of circumstances and conditions, not a conjectural one. Of course, if by agreements or combinations among carriers it were found that at a particular point rates were unduly influenced by a suppression of competition, that fact would be proper to consider in determining the question of undue discrimination and the reasonableness *per se* of the rates at such competitive points.⁵

Sec. 573. Joint rates under section four.—In making joint rates, two connecting carriers in effect form a new and independent line, and their joint rate may be less than the sum of the local rates without violating the long and short haul clause found in the fourth section.⁶ But it would seem that in making a joint rate a railroad cannot violate the long and short haul clause and discriminate against shippers on a connecting line by making the joint rate for the long haul less than the local rate for the short haul.⁷

State Regulation of Rates.

Sec. 574. Discrimination in rates—State statutes.—Legislation of the same general character as the Interstate Commerce Act has also been had in many of the states, and the question of the power of the state legislatures over the subject has been much considered. Entire unanimity does not exist, but it is well settled that it is within the power of the state legislatures to prevent unjust and unreasonable discrimination by the carriers operating within the state,⁸ and

5. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 190 U. S. 273, 23 Sup. Ct. R. 687, 47 L. Ed. 1047, *affirming* 108 Fed. 988, 46 C. C. A. 685, *reversing* 102 Fed. 709 and 101 Fed. 146.

6. *Railway Co. v. Osborne*, 52 Fed. 912, 3 C. C. A. 347, 10 U. S. App. 430, *reversing* *Osborne v. Railway*, 48 Fed. 49.

7. *Junod v. Railway Co.*, 47 Fed. 290.

8. *Illinois Cent. R. Co. v. People*, 121 Ill. 304; *Chicago, etc. R. Co. v. People*, 67 Ill. 11; *Railroad Co. v. Jones*, 149 Ill. 361, 37 N. E. Rep. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278; *Osborn v. Railroad Co.*, 123 Mich. 669, 82 N. W. Rep. 526; *State v. Railroad Co.*, 22 Neb. 313; *Dillon v. Railroad Co.*, 43 N. Y. Supp. 320, 19 Misc. 116; *Gulf, etc. Ry. Co. v. Dwyer*, 75 Tex. 572.

A state legislature has the gen-

that, except where the power has been clearly renounced in the charter of the carrier, it is competent for the legislature to regulate, within reasonable limits, the rates that may be charged by common carriers for the transportation of passengers and property within the state.⁹ That the legislature has

eral power to fix a maximum rate. *Pingree v. Railroad Co.*, 118 Mich. 314, 76 N. W. Rep. 635, 53 L. R. A. 274; *Railroad Co. v. Middlesex & S. Traction Co.*, 70 N. J. L. 732, 58 Atl. Rep. 332.

In Missouri there are two statutes, one regulating freight charges in any direction over any part of the road, and the second in the same direction under like circumstances and conditions. *McGrew v. Railway Co.*, 177 Mo. 533, 76 S. W. Rep. 995.

A state has a clear right to pass upon the reasonableness of contracts between connecting roads for a joint action in the transportation of persons or property. *Railroad Co. v. State of Minnesota*, 186 U. S. 257, 46 L. Ed. 1151, 22 Sup. Ct. 900, *affirming* 80 Minn. 191, 83 N. W. Rep. 60; *Blair v. Railway Co.*, 109 Iowa 369, 80 N. W. Rep. 673; *Railway Co. v. Dey*, 82 Iowa, 312, 48 N. W. Rep. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436; *State v. M. & St. L. Railroad*, 80 Minn. 191, 83 N. W. Rep. 60.

For cases impliedly recognizing the right of the state to regulate rates, but which deal with technical construction of the various state statutes, see the following cases:

Railway Co. v. Anniston Foundry, etc. Co., 135 Ala. 315, 33 So. Rep. 274; *Railroad Co. v. Harris*, 62 Ark. 452, 36 S. W. Rep. 186; *State v. Railroad Co.*, 27 Fla. 403,

9 So. Rep. 89; *Illinois Cent. Railroad Co. v. Commonwealth*, 23 Ky. L. Rep. 544, 63 S. W. Rep. 448; *Hutcheson v. Railroad Co.*, 22 Ky. L. Rep. 1871, 63 S. W. Rep. 33; *s. c.* 57 S. W. Rep. 251; *Railroad Co. v. Vancleave*, 23 Ky. L. Rep. 479, 63 S. W. Rep. 22; *Railroad Co. v. Commonwealth*, 24 Ky. L. R. 1593, 1609, 1779, 71 S. W. Rep. 910; *Louisville & N. Railroad v. Commonwealth*, 22 Ky. L. Rep. 328, 57 S. W. Rep. 508; *Conn v. Railroad Co.*, 21 Ky. L. Rep. 469, 51 S. W. Rep. 617; *Louisville & N. Railroad v. Commonwealth*, 18 Ky. L. Rep. 42, 99 Ky. 132, 35 S. W. Rep. 129, 43 L. R. A. 541, 59 Am. St. Rep. 457; *McGrew v. Railway Co.*, 114 Mo. 210, 21 S. W. Rep. 463; *Winsor Coal Co. v. Railroad Co.*, (Mo.) 52 Fed. 716; *Corporation Commission v. Seaboard Air Line System*, 127 N. C. 283, 37 S. E. Rep. 266; *Railroad Co. v. Lone Star Salt Co.*, 19 Tex. Civ. App. 684, 48 S. W. Rep. 619; *Railroad Commission of Texas v. Weld*, 95 Tex. 278, 66 S. W. Rep. 1095, *reversing* (Tex. Civ. App.) 66 S. W. Rep. 122.

A reduced fare may be in the form of a limited ticket, universally used, and issued at a lower rate. *Edson v. Railroad Co.*, 144 Cal. 182, 77 Pac. Rep. 894.

9. *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Railroad Co.*, 94 U. S. 164; *Chicago, etc. R. Co.*

deprived itself of the power will not be presumed, and it will only be held to have done so where it appears by "words of positive grant or words equivalent to law."¹⁰ And even where the power has been renounced, the state may still supervise the rates charged by the carrier and keep them within the limits of its power.¹¹ But "it is not to be inferred that the power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of

v. Ackley, 94 U. S. 179; *Ruggles v. Illinois*, 108 U. S. 526; *Stone v. Trust Co.*, 116 U. S. 307; *Dow v. Beidelman*, 125 U. S. 680; *Georgia Banking Co. v. Smith*, 128 U. S. 174; *Chicago, etc. Ry. Co. v. Minnesota*, 134 U. S. 418; *Wellman v. Railway Co.*, 83 Mich. 592; *Stone v. Yazoo, etc. R. Co.*, 62 Miss. 607; *Georgia, etc. Co. v. Smith*, 70 Ga. 694; *Trammel v. Dinsmore*, (Ga.) 102 Fed. 794, 42 C. C. A. 623; *Railway Co. v. Wells*, 61 Ohio St. 268, 55 N. E. Rep. 827.

If the maximum rates are too high in the judgment of the legislature, it may lower them, provided it does not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. *Railway v. Smith Co.*, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. 565, reversing *Smith v. Railway Co.*, 114 Mich. 460, 72 N. W. Rep. 328.

10. *Chicago, etc. Ry. Co. v. Minnesota*, 134 U. S. 418. The power conferred upon a corporation by its charter to make all needful rules and regulations respecting the rates of toll and the manner of collecting them is not exclusive nor does it amount to an irrevocable contract with the company that it shall have the right for all future time to prescribe the rates of toll free from all control by the legislature of the state. *Id.*; *Pennsylvania R. Co. v. Miller*, 132 U. S. 75; *Stone v. Trust Co.*, 116 U. S. 307; *Mathews v. Board of Corporation Commissioners*, 97 Fed. 400; *s. c.* 106 Fed. 7.

But see *Ball v. Railroad Co.*, 93 Fed. 513, in which it was assumed by the court that an exemption in favor of a railroad from interference by the state of the power of making rates would pass to the purchaser on the sale of the railroad's franchise.

11. *Stone v. Yazoo, etc. R. Co.*, 62 Miss. 607; *Mississippi Railroad Commission v. Railroad Co.*, 78 Miss. 750, 29 So. Rep. 789.

private property for public use without just compensation or without due process of law.'¹²

Where the state may regulate the rates to be charged, it is competent to establish a board or commission to carry the regulations into effect; but an act which makes the action of such a board or commission final and exclusive of judicial review is void, as depriving the carrier of the equal protection of the law and depriving him of his property without due process of law.¹³

Rates in excess of those authorized by the law which have been exacted by the carrier and paid by the shipper to secure transportation may be recovered back.¹⁴

But an agreement made between a railroad company and a competitor that during a limited time the former company "will not reduce its present rates of fares, unless required by law," has been held to be not contrary to public policy.¹⁵

12. *Stone v. Trust Co.*, 116 U. S. 307; *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 418; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. R. 418, *affirming Ames v. Railway Co.*, 64 Fed. 165; *decree modified*, 171 U. S. 361, 18 Sup. Ct. R. 888, 43 L. Ed. 197; *Wallace v. Railroad Co.*, 118 Fed. 422, 55 C. C. A. 192; *Metropolitan Trust Co. v. Railroad Co.*, 90 Fed. 683; *Southern Pacific Co. v. Board of Railroad Commissioners*, 78 Fed. 236; *s. c.* 95 Fed. 572.

The terms "unreasonable" and "unjust" are not to be restricted to mean that a regulation complained of is a taking of property without proper compensation, or without due process of law. *Railroad Commission v. Houston & T. C. Railroad*, 90 Tex. 340, 38 S. W. 750; *Railroad Commission v. Weld & Neville*, 96 Tex. 394, 73 S. W. Rep. 529, *reversing s. c.* 68 S. W. Rep. 1117.

13. *Chicago, etc. Ry. Co. v. Min-*

nesota, 134 U. S. 418; *State v. Johnson*, 61 Kan. 803, 60 Pac. Rep. 1068, 49 L. R. A. 662.

The provision of the California constitution making rates fixed by the board of railroad commissioners conclusive is not equivalent to directing them to be made unreasonable. *Southern Pacific Co. v. Board of Railroad Commissioners*, 78 Fed. 236; *s. c.* 95 Fed. 572.

A state board of railroad commissioners is usually vested with *quasi* judicial powers, but is not a state court within the meaning of section 720 of the Revised Statutes of the United States (U. S. Compiled St. 1901, p. 581) which prohibits any court of the United States from issuing an injunction restraining proceedings in any court of a state. *Railroad Co. v. Brown*, 123 Fed. 946.

14. *Transportation Co. v. Sweetzer*, 25 W. Va. 434.

15. *Railroad Co. v. Middlesex &*

Penal statutes regulating rates must, of course, be construed strictly.¹⁶

Sec. 575. Power of a state railroad commission to establish rates.—The presumption is that the rates fixed by a state legislature or state railroad commission are reasonable, and the burden of proof is upon the railroad companies to show the contrary.¹⁷ But when a state railroad commission is authorized to make a schedule of rates, and their schedule is merely given the force and effect of *prima facie* evidence as to the reasonableness of the rates in a suit involving the question of such reasonableness, there is no delegation to the state railroad commission of the legislative power to establish rates. The legislature thereby merely refrains from the exercise of its constitutional power to fix reasonable maximum rates of charges, and by leaving the question as to the reasonableness of the rates open, makes room for the exercise by the courts of their jurisdiction upon the subject.¹⁸ The legislature, however, may deprive railroad companies of the power to make rates, and confer that authority upon a railroad commission.¹⁹ In either event the extent of judicial interference is protection against unreasonable rates.²⁰ The rates must also first

S. Traction Co., 70 N. J. L. 732, 58 Atl. Rep. 332.

16. Hall v. Railroad, 44 W. Va. 36, 28 S. E. Rep. 754, 41 L. R. A. 669, 67 Am. St. Rep. 757.

17. Railroad Co. v. State of Minnesota, 186 U. S. 257, 22 Sup. Ct. R. 900, 46 L. Ed. 1151, *affirming* 80 Minn. 191, 83 N. W. Rep. 60; Railway Co. v. Smith, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. 565, *reversing* Smith v. Railway Co., 114 Mich. 460, 72 N. W. Rep. 328; Matthews v. Board of Corporation Commissioners, 106 Fed. 7; s. c. 97 Fed. 400; Barris v. Railroad Co., 102 Iowa, 375, 71 N. W. Rep. 339; Railway Co. v. Dey, 82 Iowa 312, 48 N. W. Rep. 98,

12 L. R. A. 436, 31 Am. St. Rep. 477; Steenerson v. Railway Co., 69 Minn. 353, 72 N. W. Rep. 713.

18. Chicago, etc. Railroad Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141. See also, Edson v. Railway Co., 133 Cal. 25, 65 Pac. Rep. 15.

19. Railroad Commission v. Weld & Neville, 96 Tex. 394, 73 S. W. Rep. 529, *reversing* 68 S. W. Rep. 1117; State v. Atlantic Coast Line R. Co., — Fla. —, 40 So. Rep. 875.

20. Railway Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. R. 400, 36 L. Ed. 176, *affirming* 83 Mich. 592, 47 N. W. Rep. 489; Trammel v. Dinsmore, 102 Fed. 794, 42 C. C.

be fixed before the court can interfere, and allegations as to the unconstitutionality of the law under which a commission acts and threatened consequences of the exercise of the power to fix rates in multiplicity of suits and irreparable injury cannot be set up as a basis of equity interposition before the rates have first been fixed.²¹

Sec. 576. A state has no control over interstate rates.—A state undoubtedly has the right to regulate rates and prevent unjust discrimination on domestic commerce wholly within its own borders, but as soon as traffic takes on the character of interstate commerce its power of regulation ceases. The question consequently often arises whether a particular transaction is domestic or interstate commerce. In general it may be said that a railroad company whose line is wholly in one state, and which, although it carries freight destined to points beyond such state, never issues through bills of lading to points beyond its own line, receives no freight on through bills of lading, and which has no arrangement with other roads for a conventional division of charges or for a common control is not within the purview of the Interstate Commerce Act and is subject to state regulation alone.²² And this power of the state extends to the regulation of the joint tariffs of connecting roads operating wholly within its boundaries.²³ It

A. 623; *Railroad Co. v. Middlesex & S. Traction Co.*, 70 N. J. L. 732, 58 Atl. Rep. 332.

Although third parties should not be permitted, as a matter of right, to intervene and be made formal parties to the suit, and thus, in a measure control the case, the commission, and, on appeal, the court should be liberal in receiving evidence upon the question of what is a reasonable rate or charge to be made by the carrier proceeded against, and in their discretion may receive evidence and hear arguments in behalf of any person or corporation

specially, although indirectly, interested in the result. *Steenerson v. Railway Co.*, 60 Minn. 461, 62 N. W. Rep. 826.

21. *McChord v. Railroad Co.*, 183 U. S. 483, 22 Sup. Ct. R. 165, *reversing* *Railroad Co. v. McChord*, 103 Fed. 216.

22. *Interstate Commerce Commission v. Brimson*, 154 U. S. 457; *United States v. Chicago, etc. Railroad*, 81 Fed. 783; *Interstate Commerce Commission v. Bellaire, etc. Railway Co.*, 77 Fed. 942; *Ex parte Koehler*, 30 Fed. 869.

23. *Railroad Co. v. State of Minnesota*, 186 U. S. 257, 22 Sup. Ct.

would, however, be beyond the scope of this work to go over the whole field of what is and what is not interstate commerce, so only the best illustrative cases are gathered in the footnote.²⁴

Sec. 577. The reasonableness of a state rate must be determined without reference to carrier's interstate business.—
The reasonableness or unreasonableness of rates prescribed by

R. 900, 46 L. Ed. 1151, *affirming* 80 Minn. 191, 83 N. W. Rep. 60.

24. The instant property is delivered and a sale completed in a state after an interstate shipment, it becomes a part of the common mass of property subject to the laws of that state, and its further transportation by the vendee, although without breaking bulk, is a matter for state regulation. *Railway Co. v. State*, 97 Tex. 274, 78 S. W. Rep. 495, *affirming* 32 Tex. Civ. App. 1, 73 S. W. Rep. 429.

A consignment of cattle was made to Kansas City, Mo. The stock yards where the cattle were unloaded extended over the Missouri state line into Kansas. The office of the consignee and the actual unloading were in the latter state, but those facts were held not to change the transaction into interstate commerce, the obligation of the carrier only extending to Kansas City, Mo., any other place of delivery being merely used for the convenience of the parties. *Scammon v. Railroad Co.*, 41 Mo. App. 194.

Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed

in transporting the commodity, some acting entirely in one state and some through two or more states, does in no respect affect the character of the transaction. Thus, where orange growers in Florida shipped their fruit from one point in that state to another point in the same state, consigned to their agent at the latter point for reshipment, who immediately forwarded them to their destination in another state, it was held that the shipment from the growers to the forwarding agent was interstate commerce not subject to the control of the Florida Railway Commission. *Cutting v. R. & Nav. Co.*, 46 Fed. 641. See also along the same lines, *Railway Co. v. Barry*, (Tex. Civ. App.) 45 S. W. Rep. 814; *Houston, etc. Navigation Co. v. Insurance Co.*, 89 Tex. 1, 32 S. W. Rep. 889, 59 Am. St. Rep. 17, 30 L. R. A. 713, *reversing Id.*, 31 S. W. Rep. 685; *State v. Southern Kan. Ry. Co. of Texas*, (Tex. Civ. App.) 49 S. W. Rep. 252 and *Railway Co. v. Fort Grain Co.*, 7 Tex. Ct. Rep. 207, 72 S. W. Rep. 419, 73 S. W. Rep. 845.

A railroad corporation while engaged in interstate commerce is not rendered subject to state control by a provision in the charter granted it by the state that it shall be subject to the laws applicable to common carriers.

a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as the rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as the rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable as between the carrier and the public in respect of domestic business. The argument that a railroad line is an entirety, that its income goes into, and its expenses are provided for out of a common fund, and that its capitalization is on its entire line within and without the state, can have no application where the state is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business.²⁵

But it by no means follows that railway companies are entitled to earn the same percentage of profits upon all classes of freight carried. It often happens that, to meet competition from other roads at particular points, the companies themselves fix a disproportionately low rate upon certain classes of freight consigned to these points. And it is not beyond

Houston, etc. Navigation Co. v. Line Ry. Co., — Fla. —. 37 Insurance Co., *supra*. So. Rep. 314; Osborn v. Railroad

25. Smyth v. Ames, 169 U. S. Co., 126 Mich. 113, 85 N. W. Rep. 466, 18 Sup. Ct. R. 418, *affirming* 466; State v. Express Co., 81 Minn. Ames v. Railway Co., 64 Fed. 165. 87, 83 N. W. Rep. 465; Steenerson

See also, Railway Co. v. Keyes, v. Railway Co., 69 Minn. 353, 72 N. 91 Fed. 47; State v. Seaboard Air W. Rep. 713.

the power of a state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and the burden is upon them to impeach the action of the commission in this particular.²⁶

Sec. 578. Reasonableness of state rates should be determined by a study of the rates themselves.—The real question in every case is as to the reasonableness of the rates fixed, and that question should be decided on studying the rates themselves under all the conditions which would show reasonableness or unreasonableness.²⁷ The fact that a member of the state railroad commission had pledged himself, before his election, to make certain changes in rates which are embodied in schedules by the commission, does not affect the validity of such schedule, nor does the interest, as a shipper, in the rates fixed, of one of the commissioners who takes part in fixing them, but whose vote is not necessary to the decision, render such decision invalid.²⁸ The fact that a state railroad commission had previously considered the question of rates at different times, and had determined that the rates then in force were just and reasonable, coupled with an allegation that there has since been no change in conditions to warrant a reduction of rates is not impertinent in a bill by a railroad company to restrain the enforcement of an order by the commission reducing rates on the ground that they were not just and reasonable, nor are allegations that the commission without just ground for discrimination has not reduced rates on certain other roads similarly situated. But statements of the governor of the state and his attitude toward a reduction of rates are immaterial and impertinent, if alleged.²⁹

Sec. 579. Mileage as a factor in determining the reasonableness of rates.—Mileage, although not a conclusive, is still

26. *Railroad Co. v. State of Minnesota*, 186 U. S. 257, 22 Sup. Ct. R. 900, 46 L. Ed. 1151, *affirming* 80 Minn. 191, 83 N. W. Rep. 60. 28. *Southern Pacific Co. v. Board of Railroad Commissioners*, 78 Fed. 236; *s. c.* 95 Fed. 572.

27. *Anniston Mfg. Co. v. Railway Co.*, — Ala. —, 40 So. Rep. 965. 29. *Railroad Co. v. Board of Railroad Commissioners of State of North Carolina*, 90 Fed. 33.

an important factor in determining the reasonableness of domestic rates. The fact, therefore, that a state railroad commission in fixing the rates between two points gradually reduced that rate in proportion to the mileage, while the railroad charged the same arbitrary rate to all stations between those points tends to show that the rates of the state railroad commission were fixed upon a more reasonable principle than that applied by the railroad.³⁰

Sec. 580. Comparison of rates as a criterion of reasonableness.—That rates fixed by a state railroad commission are unreasonable may not be proven by showing what carriers in other states charge, where there is no showing that conditions are similar.³¹ On the other hand, in determining the reasonableness of the rate on an article, a jury would certainly be at liberty to consider the fact that articles of the same kind and quality were carried by the same carrier over the same line and in the same direction for an equal distance at a much lower rate than the rate on the article in question.³²

The rates under the Uniform Bill of Lading are necessarily lower than under the full common-law liability, and consequently distinct from the latter. If the rates under the full common-law liability are unreasonable and exorbitant, that fact will not render the Uniform Bill of Lading rates invalid, providing they are themselves reasonable.³³

30. *Railroad Co. v. State of Minnesota*, 22 Sup. Ct. R. 900, 186 U. S. 257, 46 L. Ed. 1151, *affirming* 80 Minn. 191, 83 N. W. Rep. 60.

31. *Hopper v. Railway Co.*, 91 Iowa 639, 60 N. W. Rep. 487; *Aniston Mfg. Co. v. Railway Co.*, — Ala. —, 40 So. Rep. 965.

32. That a carrier's rate was 8 cents per hundred pounds on brick, while it was 4½ cents on stone, may be taken into consideration by a jury. *Railway Co. v. Bruce*, 55 Ark. 65, 17 S. W. Rep. 363.

Where a petition alleges that joint rates were established for all stations upon either line of two railway companies, the rates and charges for the same class of goods over like distances of road may be considered, not only in arriving at the solution of the question of unjust discrimination, but also in determining whether the rate charged was unreasonable. *Blair v. Railway Co.*, 109 Iowa 369, 80 N. W. Rep. 673.

33. *Mannheim Ins. Co. v. Transportation Co.*, 72 Minn. 357, 75 N. W. Rep. 602.

Sec. 581. A rate on a single article may be unreasonable.—

In exercising its power of supervising rates, a state railroad commission is not bound to reduce the rates upon *all* classes of freight, which may perhaps be reasonable, except as applied to a particular article; and if, upon examining the tariffs of a certain road, the commission is of opinion that the rate upon a particular article, or class of freight, is disproportionately or unreasonably high, it may reduce such rate, notwithstanding that it may be impossible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously such a reduction could not be shown to be unreasonable simply by proving that, if applied to all classes of freight, it would result in an unreasonably low rate. It sometimes happens that for purposes of ultimate profit and of building up a future trade, railways carry both freight and passengers at a positive loss; and while it may not be within the power of the commission to compel such a tariff, it would not upon the other hand be claimed that the railroads could in all cases be allowed to charge grossly exorbitant rates as compared with rates paid upon other roads, in order to pay dividends to stockholders. Each case must be determined by its own considerations, and while the rule is undoubtedly sound as a general proposition that the railways are entitled to a fair return upon the capital invested, it might not justify them in charging an exorbitant mileage in order to pay operating expenses, if the conditions of the country did not permit it.³⁴

34. Railroad Co. v. State of Minnesota, 186 U. S. 257, 46 L. Ed. 1151, *affirming* 80 Minn. 191, 83 N. W. Rep. 60; *Railroad Commission v. Weld & Neville*, 96 Tex. 394, 73 S. W. Rep. 529, *reversing* 68 S. W. Rep. 1117.

See also, *Smyth v. Ames*, 171 U. S. 361, 18 Sup. Ct. R. 888, 43 L. Ed. 197, *modifying decree in* 169 U. S. 466, 18 Sup. Ct. R. 418.

There is no rule of the common law nor provision of the statute which requires the carrier or the commission to make rates based on car-load lots, nor is there any precedent or principle by which the reasonableness of a rate (as it affects individual shippers) made by carriers or by the commission can be determined by a comparison of the profits derived from

Sec. 582. Carrier entitled to reasonable profits on property used by it.—While the legislature has the right to regulate, and within proper bounds to limit rates, it does not appear to have the right thereby to destroy or take away such reasonable profits as may be earned by the corporation for the benefit of its stockholders.³⁵ As long as the rates are reasonable and do not unjustly discriminate, a carrier is entitled to earn some amount, and it seems reasonably clear that it is entitled to earn a compensatory amount equal, at least, to the usual and legal rate of interest, in the locality where the railroad is situated.³⁶

Sec. 583. How value of railroad's property is determined.—The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just and right in each case. There may also be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for

the shipment of different classes of freight. Railroad Commission

v. Weld & Neville, supra.

35. *Ball v. Railroad Co.*, 93 Fed. 513; *Railway Co. v. Smith*, 110 Fed. 473; *Kansas, etc. Railway Co. v. Board of Railroad Commissioners*, 106 Fed. 353; *Southern Pacific Co. v. Board of Railroad Com-*

missioners, 78 Fed. 236; *s. c.* 95 Fed. 572.

36. *Railroad Co. v. Brown*, 123 Fed. 946; *Metropolitan Trust Co. v. Railroad Co.*, 90 Fed. 683; *Southern Pacific Co. v. Board of Railroad Commissioners*, 78 Fed. 236; *s. c.* 95 Fed. 572.

the use of a public highway than what the services rendered by it are reasonably worth.³⁷

A mere estimate of the cost of replacing the physical structures of the road is too narrow a basis upon which to determine its value as the capital on which its owners are entitled to earn dividends, and as the basis for the fixing of rates by the state. The value of railroad property is largely a matter of growth. In large sparsely settled countries a railroad property and business cannot be reproduced except by a judicious selection of location, by small beginnings and gradual advance through a number of years, more or less, of unproductive growth. The particular location of a road, of course, cannot be reproduced, and it is therefore not only impracticable, but impossible, to reproduce a road, in any just sense, or

37. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. R. 418, *affirming* *Ames v. Railway Co.*, 64 Fed. 165; *Matthews v. Board of Corporation Commissioners*, 106 Fed. 7; *s. c.* 97 Fed. 400.

"The reasonable cost of construction is to be considered in determining the fair value of the company's property, which is an element entering into the question of reasonableness of the rate; but the cost of construction is not to be deducted from the earnings under the proposed rates, in ascertaining if those rates are reasonable; for under such a rule the public would be compelled to pay for constructing the roads without being entitled to its ownership." *State v. Seaboard Air Line Ry. Co.*, — Fla. —, 37 So. Rep. 314.

Where the price of urban or suburban property in or near a rapidly growing city is higher than is warranted by any annual income which can be obtained from any use to which the prop-

erty can at present be put, and such excess in market value is caused by the anticipation of still higher prices in the future, a reasonable annual income on the cost of reproducing railroad terminals out of such property is less than a reasonable income on the cost of reproducing other portions of the road which when reproduced are not likely to increase in value. *Steenerson v. Railway Co.*, 69 Minn. 353, 72 N. W. Rep. 713.

In ascertaining the cost of operating a railroad, with reference to determining the reasonableness of rates, the expenses of operation are not to be strictly limited to the cost of running trains, excluding all betterments, but the cost of reasonable renewals and improvements of road, bed, track and equipment should be included in the operating expenses. *Southern Pacific Co. v. Board of Railroad Commissioners*, 78 Fed. 236; *s. c.* 95 Fed. 572; *Metropolitan Trust Co. v. Railroad Co.*, 90 Fed. 683.

according to any fair definition of those terms. Promoters and proprietors of roads look to the future, as they have a right to do, and as they are induced to do by the solicitation of the various communities through which they run, and by various encouragements offered by the state.³⁸

If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged.³⁹

A sworn return made by high officers of a railroad of the value of the property for taxation constitutes valuable evidence in determining the value of the property for the purpose of effecting rates or charges for freights or passengers, yet it does not constitute an estoppel when the question in controversy is the actual value or cost of reproduction.⁴⁰

38. Metropolitan Trust Co. v. Railroad Co., 90 Fed. 683.

39. Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. R. 418, *affirming* Ames v. Railway Co., 64 Fed. 165; *s. c. modified in* 171 U. S. 361, 18 Sup. Ct. R. 888, 43 L. Ed. 197; State v. M. & St. L. Railroad Co., 80 Minn. 191, 83 N. W. Rep. 60.

The question whether the rates for transportation fixed by the state railroad and warehouse commission are unreasonable and confiscatory is not determined by the fact that the income under the rates so fixed will not pay the amount of the fixed charges of the railroad. Neither can the amount at which the railroad sold years ago on mortgage foreclosure sale

be taken as the basis on which to determine what are reasonable rates, but that question is determined by ascertaining what, under all the circumstances, is a reasonable income on the cost of reproducing the road at the present time. To hold otherwise would leave the public at the mercy of every railroad manipulator, and offer a premium on all kinds of schemes for increasing the fixed charges of railroads. It would make the state or public indirectly guaranty the payment of the mortgage bonds of every railroad. Steenerson v. Railway Co., 69 Minn. 353, 72 N. W. Rep. 713.

40. Railroad Co. v. Brown, 123 Fed. 946.

Sec. 584. Courts should be fully advised of receipts and earnings of a railroad.—Before the courts are called upon to adjudge an act of the legislature fixing the maximum rate for railroad companies to be unconstitutional on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this that the legislative power rests subservient to the discretion of any railroad corporation which may by exorbitant and unreasonable salaries or in some other improper way transfer its earnings into what it is pleased to call “operating expenses.”⁴¹

Sec. 585. Cost of local business is greater than cost of interstate business.—In order to ascertain the true effect of a reduction of rates by a state board of railroad commissioners, the cost of doing the local business must be found and a comparison made between the gross receipts and the cost of doing the business, thus ascertaining the net earnings. It cannot be said that the rates which a legislature prescribes are reasonable if the railroad company charging only those rates finds the necessary expenses of carrying on its business greater than its re-

41. *Railway Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. R. 400, 36 L. Ed. 176, *affirming* 83 Mich. 592, 47 N. W. Rep. 489.

Where for a number of years prior to the passage of an act regulating the rates to be charged on passenger trains, railroad earnings were reported under two heads, “Passenger Earnings” and “Freight Earnings,” and in the former were included earnings

from “passenger fares, express, baggage and mails,” if the regulation as to rates in the statute is based on “the earnings of the passenger trains,” the courts will assume that the legislature was familiar with those prior reports, and used the term “earnings from passenger trains” with the meaning that had thus been given to it. *Osborn v. Railroad Co.*, 123 Mich. 669, 82 N. W. Rep. 526.

ceipts.⁴² Owing to the fact that local traffic is light in volume, short in haul and small in individual shipments, the cost of transportation may be, in relation to income, at least twice as great for local business as for the entire business of the carrier.⁴³

Sec. 586.—Effect of connecting and branch lines in determining the reasonableness of a rate.—The fact that a line of railroad is operated in connection with other lines owned by the same company, but under separate charters, whereby the earnings of such line are increased and its operating expenses reduced, does not prevent its being considered as a separate and independent line for the purpose of determining the reasonableness of rates thereon fixed by the state; full consideration of the joint operation being given when the road is credited for the increased business and reduced expenses.⁴⁴

But where there has been a consolidation of several railroads into one, the correct test as to the effect of a state statute regulating rates is as to its effect on the entire line and not upon that part which was formerly a part of one of the consolidating roads; the company cannot claim the right to earn a net profit from every mile, section or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative, for it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated. To the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the state in question.⁴⁵

When any feeder or extension portion of a railroad line or

42. *Railway Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. R. 336, 44. *Railroad Co. v. Brown* 123 Fed. 946.

44 L. Ed. 417, *reversing* 90 Fed. 363. 45. *Railway Co. v. Gill*, 156 U. S. 649, 39 L. Ed. 567, 15 Sup. Ct.

43. *Railway Co. v. Keyes*, 91 Fed. 47. R. 484, *affirming* 54 Ark. 101, 15 S. W. Rep. 18.

system is an incumbrance on the rest of the line or system, so that the rest of the line or system would at the same rates produce more net income if such portion did not exist (that is, if all the gross earnings on all the traffic passing over such portion, and on the whole length of the haul on such traffic, will not pay the operating expenses on such traffic for the whole length of such haul, and pay for the wear and tear on the line or system caused by such additional traffic, and also pay a reasonable income on the cost of reproducing such portion of the line), and these conditions are not of a temporary character, but are the result of building the feeder or extension where there was not sufficient business to justify its existence, then such portion of the line is not self-supporting, but is an incumbrance on, and not a feeder of, the rest of the line or system, and in determining what are reasonable rates for the rest of the line or system, such portion may be rejected. And under the statute the burden is on the railway company to show that such extension is self-supporting.⁴⁶

Sec. 587. A rate, though reasonable, should not tend to create a monopoly.—A railroad commission, in making rates, may properly bear in mind that the probable effect of a certain rate would be the creation of a monopoly to the detriment of the public. Thus the owners of improved machinery for ginning and baling cotton have a right to all the benefits of its superiority over the old machinery, but they have no right to a lower rate on their cotton because it is compressed into smaller round bales than other cotton which is shipped, nor have they any right to ask the government to lend its power to their aid in that respect to the injury of the citizenship of the state.⁴⁷

Sec. 588. Discrimination to be actionable must be unjust.—Under the state statutes discrimination alone does not subject the railway company to the statutory penalty. The discrimination must be unjust and wilfully made under like circumstances

46. *Steenerson v. Railway Co.*, 96 Tex. 394, 73 S. 69 Minn. 353, 72 N. W. Rep. 713. W. 529, reversing 68 S. W. Rep.

47. *Railroad Commission v.* 1117.

and conditions.⁴⁸ Thus the mere fact that a railroad company charges one person more than another for carrying coal from the same place is not conclusive evidence of unjust discrimination where it is shown that there is a difference in the coal, and in the method of handling it.⁴⁹

At common law, and usually under state statutes, the party complaining is required to show that a discrimination was unjust and unreasonable,⁵⁰ but under some state statutes the burden of proof is upon the carrier to show that it was reasonable and just.⁵¹

Sec. 589. A special rate is not always unjustly discriminative.—A contract by a railroad company to carry freight for a shipper at a special rate, less than its published schedule, is not *prima facie* void either under the common law or under the provision in the constitution of a state forbidding undue or unreasonable discrimination in freight charges by railroads, in the absence of evidence that such rate is a special privilege.⁵² But where a lower rate is given by a railway to a favored shipper, which is intended to give, and necessarily gives, an exclusive monopoly to the favored shipper, affecting the business and destroying the trade of other shippers, the latter have the right

48. *Louisville & N. R. Co. v. Commonwealth*, 20 Ky. L. Rep. 1099, 48 S. W. Rep. 416; *Commonwealth v. Chesapeake & O. Railway Co.*, 24 Ky. L. Rep. 1887, 72 S. W. Rep. 758; *Railway Co. v. Langsdale*, (Tex. Civ. App.) 30 S. W. Rep. 681.

The word "contemporaneous" as used in the North Carolina statute does not mean the exact day, hour, or necessarily month, but it means a period of time through which the shipment of goods or freights is made by one shipper at one rate, and by other shippers at another rate. *Hilton Lumber Co. v. Railroad Co.* — N. Car. —, 53 S. E. Rep. 823.

49. *Savitz v. Railway Co.*, 150 Ill. 208, 37 N. E. Rep. 235, *affirming* 49 Ill. App. 315; *Commonwealth v. Louisville & N. R. Co.*, 24 Ky. L. Rep. 509, 68 S. W. Rep. 1103; *Railroad Co. v. Crown Coal Co.*, 43 Ill. App. 228.

50. *Hilton Lumber Co. v. Railroad Co.*, — N. Car. —, 53 S. E. Rep. 823.

51. *Railroad Commission v. Weld & Neville*, 96 Tex. 394, 73 S. W. 529, *reversing* (Tex. Civ. App.) 68 S. W. Rep. 1117.

52. *Railway Co. v. Bayles*, 19 Colo. 348, 35 Pac. Ry. 744; *s. c.* *Bayles v. Railway Co.*, 13 Colo. 181, 22 Pac. Rep. 341.

to require an equal rate for all under like circumstances.⁵³ The privilege, however, of asking for an equal rate for all under like circumstances, and demanding a similar rebate for one's self are separate and distinct and a shipper cannot recover for unjust discrimination by a railroad consisting in refusing him a rebate upon the established rate which it allowed others.⁵⁴ A discriminative overcharge, of course, stands in a different light, and may be recovered back by the shipper in an action against the railroad company for money had and received.⁵⁵

Sec. 590. A "rebilling" rate may be discriminative.—Unjust discrimination may be in the form of what is known as a "rebilling" rate. "A true rebilling rate is one in which the goods received in unbroken car load lots over one line of railway can be rebilled over the same or another line, completing one continuous trip of the same commodity, simply changing the consignee, and altering the destination of the identical shipment, without unloading or handling of freight." Such a rate, to receive the sanction of law, must operate uniformly and fairly, and must be open to all alike. It cannot lawfully be restricted to shippers who live in a certain locality, and who previously receive freight over the line of a certain other favored associated carrier.¹

Sec. 591. Free passes are discriminative.—The issuance of free passes except in specified cases is contrary to a number of

53. *Scofield v. Railway Co.*, 43 Ohio St. 571, 3 N. E. Rep. 907; *Railroad Co. v. Diamond Coal Co.*, 61 Ohio St. 242, 55 N. E. 616; *State v. Atlantic Coast Line R. Co.*, — Fla. —, 40 So. Rep. 875.

54. *Railway Co. v. Langsdale*, (Tex. Civ. App.) 30 S. W. Rep. 681.

55. *Hilton Lumber Co. v. Railroad Co.*, — N. Car. —, 53 S. E. Rep. 823, citing *Railroad Co. v. Steiner*, 61 Ala. 559. See also, *American Express Co. v. Crowley*, — Miss. —, 41 So. Rep. 261.

1. *Railway Co. v. Railroad Com-*

mission of Mississippi, 86 Miss. 667, 38 So. Rep. 356.

A common carrier has no right to charge one person a lower rate of freight than another for shipping the same class and quantity of goods the same distance, under the same conditions, providing the favored shipper give the carrier a consideration in the shape of subsequently shipping the manufactured product over its line. *Hilton Lumber Co. v. Railroad Co.*, 136 N. C. 479, 48 S. E. Rep. 813; s. c. — N. C. —, 53 S. E. Rep. 823.

state statutes. In North Carolina it has been held that a person riding on such a pass unlawfully cannot recover for injuries received through the negligence of the carrier, since he is in *pari delicto* with the carrier.²

Sec. 592. An extra charge may be made for a shipment received off the carrier's own line.—When a contract of affreightment is made between a railroad company and a shipper contemplating transportation over its own line only, and the goods are, in fact, afterwards delivered by the shipper to the railroad on the line of another company, necessitating the payment by the first company of the latter's local freight charges in order to switch the cars containing the goods to its own line, the imposition of such additional switching charges in addition to the contract price does not constitute undue discrimination.³

Sec. 593. Discrimination in transfer of stock from narrow-gauge to standard-gauge cars.—If a uniform rule, not unreasonable in itself, is adopted for the fixing of rates on cattle transferred from narrow-gauge cars to standard-gauge cars, such as to charge at the rate of three narrow-gauge cars for two standard-gauge ones, the shipper cannot complain that he is charged in excess of the tariff rates, if he knew of such rule, and in a particular case the standard-gauge railroad found that it could, and did, place the cattle in a less number of standard-gauge cars than he had receipted for.⁴

Sec. 594. Right of carrier to recover from shipper the difference between the discriminative and regular rate.—If a carrier makes an unlawful discrimination under a state statute in favor of a shipper by contracting to carry his goods at a lower rate than they should bear, and accepts the goods and carries them at that rate, it cannot, after the goods have reached their destination, charge against them an additional amount of

2. *McNeill v. Railroad Co.*, 132 N. C. 510, 44 S. E. Rep. 34, 95 Am. St. Rep. 641; *State v. Southern Railway Co.*, 122 N. C. 1063, 30 S. E. Rep. 133, 41 L. R. A. 246. 3. *Gilliland v. Railroad Co.*, 81 Miss. 41, 32 So. Rep. 916. 4. *Carlisle v. Railway Co.*, 97 Mo. App. 571, 71 S. W. Rep. 475.

freight sufficient to bring the total charge up to the proper rate. To do so would permit the carrier to make a rate lower than it properly should make, to secure the business, and thereafter take advantage of its own wrong to increase the charge and secure the usual compensation.⁵ This rule is at variance with the decisions under the Interstate Commerce Act, but it is more in accordance with justice and reason, and does not make the state acts swords of offence against the shipper, as is the Interstate Commerce Act in that respect.

Sec. 595. Through rate may be less than sum of locals.—

It is well settled that a through rate can be made less than the sum of the local rates between the two points. Were it otherwise, all through freight would have to be hauled at the local rates. The fact that the connecting carrier takes the goods on a vehicle pulled by horses and not by steam does not change the principle, nor that no contract exists between the two carriers for through carriage, provided the first carrier bills the goods through to the end of the second carrier's route at a rate reasonable in itself, and greater than its own local rate for its part of the carriage.⁶

Sec. 596. Right of state to compel the issuance of mileage tickets at reduced rates.—A state statute, requiring railroad companies to sell 1,000 mile mileage tickets at a reduced rate, is not a valid exercise of the right of the state to fix maximum rates for transportation, but an arbitrary enactment in favor of those able or willing to purchase the reduced rate ticket.⁷ But

5. *Railroad Co. v. Seitz*, 214 Ill. 350, 73 N. E. 585, 105 Am. St. Rep. 108, *affirming* 105 Ill. App. 89.

Rev. St., 1894, § 5333, prohibiting railroad companies "doing business in the state of Indiana" from increasing or advancing their rates of freight above, or charging for transportation more than what they charged at the time the freight was tendered to them, is not invalid as a restriction upon

interstate commerce. *Chicago, etc. Railroad Co. v. Wolcott*, 141 Ind. 267, 39 N. E. Rep. 451, 50 Am. St. Rep. 320.

6. *Railway in Kentucky v. Commonwealth*, 25 Ky. L. Rep. 1078, 77 S. W. Rep. 207.

7. *Beardsley v. Railroad Co.*, 162 N. Y. 230, 56 N. E. Rep. 488, *reversing* 44 N. Y. Supp. 175, 15 App. Div. 251, and 40 N. Y. Supp. 1077, 17 Misc. 256, and following

a state statute requiring the issuance of 1,000 mile mileage books at reduced rates, although unconstitutional so far as it purports to operate retrospectively on corporations already in existence, may be upheld as to companies subsequently incorporated under the laws of that state. A regulation as to the price of transportation which would be an illegal exaction when sought to be imposed on existing corporations solely by legislative fiat, may, in the case of future corporations, be the mere performance of the obligation of a contract.⁸

Sec. 597. Discrimination between localities.—Discrimination between cities or localities in the same state is subject to state regulation.⁹ But a discrimination in rates against a city in a state in favor of points outside the state on the same line of railway cannot be subject to consideration under a state law.¹⁰

In Arkansas it has been held that the question of discrimination in furnishing facilities to shippers of different localities is affected by the existence of competition at one point and its non-existence at another point. There was a strong dissenting opinion, however, and the rule as adopted by the majority of the court would certainly place shippers at non-competitive points at a disadvantage.¹¹

Sec. 598. A state may regulate domestic long and short haul rates.—A state, without violating the constitution of the United States may declare either in its own constitution or by statute that it shall be unlawful for any person or corporation, owning or operating a railroad in that state, to charge or receive any greater compensation in the aggregate for the trans-

Railway Co. v. Smith, 173 U. S. 684, 43 L. Ed. 858, 19 Sup. Ct. R 565, reversing Smith v. Railway Co., 114 Mich. 460, 72 N. W. Rep. 328.

8. Purdy v. Railroad Co., 162 N. Y. 42, 56 N. E. Rep. 508, 48 L. R. A. 669, affirming 54 N. Y. Supp. 1114, 33 App. Div. 643.

9. Cohn v. Railway Co., 181 Mo. 30, 79 S. W. Rep. 961.

10. Railway Co. v. Haas (Tex.) 17 S. W. 600.

11. A failure on the part of a railroad company to furnish facilities for forwarding all cotton offered at a terminal point on its line where there was no competi-

portation of passengers or property of like kind, under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance.¹² But while the state may constitutionally prohibit a short haul charge in excess of a long haul charge, it can only do so when both kinds are within the limits of the state. To hold otherwise would be to give a state power to compel the carrier to regulate, adjust or fix his interstate rates with some reference at least to his rates within the state, thus enabling the state by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the Federal Congress.¹³

Sec. 599. A shipment is an entirety in reference to long and short haul clause.—A shipment cannot be split into parts to bring it within a state constitutional or statutory long and short haul clause. The contract is usually for the entire haul, and must be considered as an entirety. The haul must be over the same line usually, and if part of it is over one line, and part over another, while the long haul is exclusively on one of the lines, the clause does not apply. Thus it would not apply to a short haul originating on a branch road, while the long haul is altogether on its main line.¹⁴

Sec. 600. Special contracts with shippers not impossibilities under long and short haul clause.—A state statute which does not punish the giving of the lower rate, but forbids the charging

tion, when it furnished sufficient transportation at competing points, in a year when the shipments of cotton were unexpectedly heavy, is not such an unjust discrimination as will subject the company to a statutory penalty. *Railway Co. v. Oppenheimer*, 64 Ark. 271, 43 S. W. Rep. 150, 44 L. R. A. 353.

12. *Railroad Co. v. Commonwealth of Kentucky*, 183 U. S.

503, 22 Sup. Ct. R. 95; *Railway Co. v. Anderson*, — Neb. —, 101 N. W. Rep. 1019; *Railroad Co. v. Commonwealth*, 23 Ky. L. R. 1159, 64 S. W. Rep. 975; *Cohn v. Railway Co.*, 181 Mo. 30, 79 S. W. Rep. 961.

13. *Railroad Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. R. 277.

14. *Railroad Co. v. Walker*, 23 Ky. L. Rep. 453, 63 S. W. Rep.

20.

of a greater compensation in the aggregate for the transportation of passengers or property of like kind under substantially similar circumstances and conditions for the shorter than for the longer haul does not make the performance of a contract with a shipper to give him a certain low rate a legal impossibility. It is true that its performance is rendered more burdensome and expensive to the railroad company by being compelled to give the same rate to other shippers under similar conditions, but that does not result from any failure on the part of the shipper to perform his part of the agreement. The railroad company is therefore not relieved of its obligation to the shipper to give him the contract rate.¹⁵

Sec. 601. Competition not a factor in construction of Kentucky long and short haul clause.—As has been seen, the highest court of Kentucky has refused to judicially construe the long and short haul clause of its state constitution out of existence. In that state, at least, the fact that competition exists at the longer, and not at the shorter distance point, does not constitute such a dissimilarity of conditions as will authorize the carrier to charge more for the short than for the long haul.¹⁶

Duty as to Stowage, Mode of Carriage, etc.

Sec. 602. (§ 303c.) General duty as to stowage on vessels.—When the carriage is by a sea-going vessel, the liability of the carrier will sometimes depend upon the manner in which the goods have been stowed. “The owner of the goods,” it is said in one case,¹⁷ “has no control over such matters. Under the law that imposes on the ship, as carrier, the duty of safe delivery, the ship takes all such risks, unless she can show the use

15. *Newport News & Miss. Valley Co. v. McDonald Brick Co.'s Assignee*, 22 Ky. L. R. 934, 59 S. W. Rep. 332. S. W. Rep. 707, 47 S. W. Rep. 598, 45 L. R. A. 541.

16. *Louisville & N. R. Co. v. Commonwealth*, 21 Ky. L. R. 232, 106 Ky. 633, 51 S. W. Rep. 164, 90 Am. St. Rep. 236; *Louisville & N. R. Co. v. Commonwealth*, 20 Ky. L. Rep. 1380, 104 Ky. 226, 46 17. *Hills v. Mackill*, 36 Fed. 702. In law, the mere fact that the shipper knew how the goods were being stowed does not alone excuse the shipowner from negligence. *Steamship Co. v. Pilkington*, (Can.) 28 S. C. R. 146.

of all reasonable skill and good judgment, or compliance with so definite a usage in the stowage and protection of the goods against injury, and such use of the well known and best means to that end as legally import an assent of the shipper to transportation in this manner." The vessel, therefore, will be liable for losses caused by defective stowage within the limits of this rule.¹⁸

Sec. 603. (§ 304.) Same subject—Stowage under deck.—It is the implied duty of the master to stow the goods in the hold of the vessel, even when the bill of lading is silent upon the subject, unless there be a well established usage to stow goods of the particular character on deck, or unless in the bill of lading, if there be one, the shipper has agreed that they may be so stowed. A bill of lading which is silent upon the subject of the manner of the stowage of the goods is called a "clean" bill of lading, and undoubtedly binds the carrier to stow the goods under deck; and, as we have seen,¹⁹ parol evidence cannot be re-

18. *Hills v. Mackill*, *supra*; *The Thos. Melville*, 31 Fed. Rep. 486, 36 *id.* 708; *The Marinin S.*, 28 *id.* 664, 32 *id.* 918; *The Maggie M.*, 30 *id.* 692; *Baxter v. Leland*, 1 Blatchf. 526; *The Sabioncello*, 7 Bene. 357; *The Nith*, 36 Fed. Rep. 383; *The Geiser*, 19 Fed. Rep. 877; *The John P. Best*, 14 Phila. 527; *Astrup v. Lewy*, 19 Fed. Rep. 536; *The St. Patrick*, 14 Phila. 596; *The Excellent*, 16 Fed. Rep. 148; *The Tommy*, 16 Fed. Rep. 601.

In *The Johanne*, 48 Fed. 733, it was held negligence to stow cases of household goods in the lower hold of an old brig where they could easily be damaged by water.

The failure to provide dunnage for a cargo of sugar, in consequence of which the bags in the lower tier are allowed to rest on the floor and are damaged by the natural drainage from above and

by soaking from sea water, is such negligence in stowage as will render the vessel liable for the consequent loss. *The Earnwood*, 83 Fed. 315.

The fact that a portion of the cargo got "adrift" and was damaged while the ship was laboring and straining during a heavy gale is not sufficient to show improper stowage as against the positive testimony of a competent witness that the cargo was stowed with reasonable or customary care. *The Isaac Reed*, 82 Fed. 566.

19. *Ante*, § 167.

A clean bill of lading binds the carrier to stowage under deck, and it is clearly within the master's right to refuse to give a bill of lading,²⁰ except "at shipper's risk," if it is impossible to store all the cargo under deck, so that an innocent holder would be ad-

ceived to show that the shipper agreed that the goods might be stowed otherwise when such a bill of lading is given. In the case of *The Delaware*,²⁰ this question of the duty of the carrier to stow the goods under deck when the bill of lading was silent as to where and how they should be stowed underwent a very thorough discussion, and it was held that the carrier who had given such a bill of lading had been guilty of negligence in stowing the goods on deck, and that he was thereby deprived of the benefit of the exception of liability for losses by the dangers of the seas in the bill of lading, although the goods had been necessarily jettisoned in a storm. "Goods, though lost by perils of the sea," say the court, "if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the act of God within the meaning of the maritime law, nor are such losses regarded as losses by the perils of the sea, which will excuse the carrier from delivering the goods shipped to the consignee, unless it appears that the manner in which the goods were stowed is sanctioned by commercial usage, or unless it affirmatively appears that the manner of stowage did not, in any degree, contribute to the disaster; that the loss happened without any fault or negligence on the part of the carrier, and that it could not have been prevented by human skill and prudence, even if the goods had been stowed under deck, as required by the general rules of the maritime law." And upon this ground it was held, not only that the master and owners of the ship were liable, but that the rest of the cargo was not liable to contribute to the loss.²¹

Sec. 604. (§ 305.) Same subject—Stowage on deck.—In the absence of a bill of lading, or when the bill of lading is silent upon the subject of stowage, it is a part of the contract of ship-

vised that such part of the cargo was not under deck. *The Kirkhill*, 99 Fed. 575, 39 C. C. A. 658.

20. 14 Wall. 579.

21. *The Rebecca Ware*, 187; *The Paragon*, *id.* 322; *Dodge v. Bartol*, 5 Greenl. 286; *Wolcott v. Ins. Co.*, 4 Pick. 429; *Copper Co. v. Ins. Co.*, 22 *id.* 108; *Adams v. Ins. Co.*, *id.* 163; *Sproat v. Donnell*, 26 Me. 185; *Lamb v. Parkham*, 1 Sprague 343.

A shipper by consenting that goods be carried on deck does not

ment that the goods shall be stowed under deck.²² It is a condition tacitly annexed to the contract by operation of law; and it is equally binding on the master, and the shipper is equally entitled to its benefit, as though it was stated in express terms.²³ But it is equally well settled that an established usage in a particular trade, or as to a particular kind of goods, may justify the carriage on deck, or may even make it the duty of the master to stow them there.²⁴

Sec. 605. (§ 306.) Same subject—Usage as affecting the right to stow on deck in particular instances.—If the goods are of a dangerous character, as for instance, if they consist of inflammable oils or liquids, it is common for a usage to exist to stow them on deck where, in case of accident, they will be likely to do the least harm and be in a position to be more readily cast overboard.²⁵ So live animals are carried on deck as more healthy for them and convenient for those who are to give them attention, and because any other mode of conveyance would be generally impracticable.²⁶ So it may be shown that, according to the custom of a particular trade, lumber was carried on deck, and, the custom being established, it was held that the owner of lumber thus being carried was entitled to contribution from the ship-owner for a loss by jettison.²⁷ And not only may goods be stowed on deck when usage in the particular trade or as to the

thereby assume the risk of loss or injury to them. *Schwinger v. Raymond*, 83 N. Y. 192.

22. *Creery v. Holly*, 14 Wend. 26; *The Delaware*, 14 Wall. 579; *The New Orleans*, 26 Fed. Rep. 44; *The Gran Canaria*, 16 Fed. Rep. 868; *The Paragon*, 1 Ware, 322.

In *Crooks v. The Fanny Skolfield*, 65 Fed. 814, the ship was held liable for leakage caused by allowing oil casks to remain on deck for two weeks in the hot sun.

23. *The Waldo, Davies*, 161.

24. *Da Costa v. Edmunds*, 4 Camp. 141.

In *Tower Co. v. Southern Pacific Co.*, 184 Mass. 472, 69 N. E. 348, a custom among steamship companies in carrying oil clothing to class it as inflammable material and stow it on deck was upheld.

25. *Da Costa v. Edmunds*, 4 Champ. 141.

26. *Brown v. Cornwell*, 1 Root, 60; *Milward v. Hibbert*, 3 Ad. & El. (N. S.) 120.

27. *Gould v. Oliver*, 4 Bing. (N. S.) 134.

particular goods justifies their being so carried, but where the safety of the goods or their preservation makes it necessary that they shall be so carried, the master and owners will become liable for damage suffered by them by reason of their being stowed in the hold of the vessel. Thus, in the case of *The Star of Hope*,²⁸ nuts in bags and boxes were shipped from New York to San Francisco, and were put into the hold of the vessel instead of upon the deck; and it being shown that when so carried they are liable to become damaged, and that the almost invariable practice was to carry such goods in the cabin, and that these were marked with directions that they should be so carried, it was held to have been culpable negligence in the master of the vessel to stow them in the hold.²⁹

Sec. 606. (§ 307.) Same subject—Damage for other goods stowed in hold.—The carrier is also liable to the shipper for damage done to his goods by other goods stowed in the hold of the vessel without allegation or proof of any wilful negligence on the part of the carrier.³⁰ If, however, it was the usage to carry salt as a part of the cargo of a general ship, it would not be negligence to take it on board with other goods, and the owner of the goods liable to be injured by its presence in the hold must bear the loss occasioned thereby, if there was no bad stowage and no inquiry made by the shipper before the goods were put on

28. 17 Wall. 651.

29. In *The New Orleans*, 26 Fed. Rep. 44, it is held that a notice on the package not to put the goods in the hold does not bind the carrier where it is not called to his attention and not mentioned in the bill of lading.

30. *Gillespie v. Thompson*, 6 El. & Bl. 477, note; *Brousseau v. Ship Hudson*, 11 La. Ann. 427; *Cranwell v. Ship Fanny Fosdick*, 15 *id.* 436; *The Bark Col. Ledyard*, 1 Sprague, 530; *Bearse v. Ropes*, 1 *id.* 331.

The omission to take any pre-

caution against protecting plum-bago from damage by cocoanut oil stowed near it is negligence for which the ship is liable if damage results. *The Gloaming*, 46 Fed. 671; *The H. G. Johnson*, 48 Fed. 696.

Damage done to flour by stowing it in a badly ventilated hold on top of barrels of kerosene in consequence of which the flour becomes saturated with kerosene, is such negligence in stowage that the ship is liable. *The Thames*, 61 Fed. 1014, 10 C. C. A. 232, 8 U. S. App. 580.

board.³¹ But if the master take on board goods in bad condition, and which from such condition endanger the safety of other goods with which they may be stowed, he and the owners as well as the vessel will be liable for any damage which may accrue from them.³²

Sec. 607. (§ 308.) Same subject—Rule as to stowage in hold confined to vessels on seas and great lakes.—It has, however, been held that this rule as to stowage in the hold of the vessel applies only to sailing vessels on sea voyages, which are expected to encounter the extraordinary perils of the seas, and that it has no application to those which navigate smoother waters and are comparatively safe from extraordinary exposures. The direct question in the case was, whether the goods which had been saved were liable, contrary to the general rule of the maritime law, which denies the right to contribution for goods carried on deck, to contribute to the loss of other goods which were being carried on the deck of a steamboat in Long Island Sound, and were jettisoned during a gale to prevent her from sinking. It was said that the sole reason for requiring the stowage of goods under deck was that goods carried on deck embarrassed the navigation of the vessel, and it was con-

31. *Clark v. Barnwell*, 12 How. 272; *Baxter v. Leland*, 1 Blatchf. 526.

Doubtless goods liable to injure each other may be carried in the same ship if it be the general usage to carry them together, provided all proper means are employed to prevent injury. But no general usage is established to carry tea and camphor in the same vessel. The practice of sometimes carrying them together in the same vessel is of very recent date, and only in vessels specially designed and built to keep the camphor in air-tight compartments. When a large part of the cargo is found to be impregnated with

camphor fumes on board a ship thus built, the inference of some want of care is irresistible. *The Glamorganshire*, 50 Fed. 840.

In *The Langford*, 143 Fed. 150, a cargo of arsenic was injured by olive oil, which, however, was held to have been properly stowed. The damage was attributed to a peril of the sea.

32. *The Bark Cheshire*, 2 Sprague, 28.

In *Lazarus v. Barber*, 124 Fed. 1007, damage was done to a cargo of goat skins by stowing them close to casks of citron, which, as the evidence showed, usually leaked.

sequently regarded as unjust that that portion of the cargo which imperiled the vessel and other parts of the cargo, if thrown overboard, should be compensated for by that which was saved. No such reason, it was said, has any application to a vessel propelled by steam, and the reason of the law ceasing, the law itself ceases. The conclusion of the court, therefore, was that the rule laid down as applicable to sailing vessels upon a sea voyage had no relation to a voyage by a steamboat upon the Sound; and that if it had, the usage established in the case to stow the goods on deck took it out of the rule.³³ A decision to the same effect had previously been made by the supreme court of Illinois,³⁴ in which it was held that the maritime rule as to general average, in case of goods jettisoned from the deck of a sailing vessel, did not apply to a double-decked propeller navigating the lakes between Chicago and Buffalo, both on account of the fact that the vessel was propelled by steam and because of the universal usage to stow freight upon the deck of boats of that kind in navigation upon the lakes. And in several other cases, it has been decided that the rule has no application to cases of vessels propelled by steam, but is confined to sailing vessels.³⁵ But in *The Milwaukee Belle*,³⁶ it was held to apply to sailing vessels upon the lakes.

Sec. 608. (§ 309.) Same subject—Inland vessels subject to same rule as carriers on land.—We may therefore safely conclude, both on reason and authority, that this rule of the maritime law as to the stowage of goods is confined to ships which sail upon the seas and the great lakes. But whether this be so or not, it can have no application to steamboats which navigate our rivers, which, as is well known, are built to carry their freight principally on deck, and could, from the character of these rivers, be made available as instruments of commerce in no other way. The only rule, therefore, which can be laid down

33. *Harris v. Moody*, 30 N. Y. Ins. Co. v. Speares, 16 Ind. 52; 266. *Hurley v. Milward*, 1 Jones &

34. *Gillett v. Ellis*, 11 Ill. 579. *Carey (Irish Exch.)*, 224.

35. *Merchants', etc. Ins. Co. v.* **36.** 2 Biss. 197.
Shillito, 15 Ohio St. 559; *Toledo*

as to the manner in which goods should be carried by them is that which applies equally to land carriers. Being peculiarly liable, however, to incur losses by accidental fires, great care is required of them in so disposing their freight as to avoid, as far as possible, dangers from that source. If negligently exposed to this risk and a loss thereby occurs, the carrier loses all the benefit of special exceptions to his liability in his bill of lading, and becomes responsible, according to the rigid rule of the common law in reference to common carriers. Such was the case of *The New J. S. N. Company v. The Merchants' Bank*.³⁷ "There was," in the language of the court, "great want of care, which amounted to gross negligence on the part of the respondents, in the stowage of the cotton; especially regarding its exposure to fire from the condition of the covering of the boiler deck and the casing of the steam chimney;" and upon this ground and for other omissions of duty, the company was held liable, notwithstanding an exemption from liability in its contract from losses which would have been otherwise sufficient for its protection.

Sec. 609. Same subject—Damage to goods in discharging cargo.—If, in discharging the cargo, the goods are temporarily placed in an unfit place in the vessel where they are likely to be damaged, the vessel will be liable for any resulting injury. Thus a vessel was held liable for the damage done to bags of filberts which, in the course of discharging, were placed so near the coal bunkers of the vessel that dust from the coal blew upon and through the bags.³⁸

Sec. 610. Stowage upon freight cars of railroad companies.—The cases bearing upon the improper stowage of goods upon freight cars of railroad companies are few in number. The duty of loading and unloading freight delivered at its station or warehouse rests primarily upon the railroad, and for its negligence in stowage the railroad company will be liable in damages. But the shipper may by contract either express or implied assume that duty; and if he does so, the railroad com-

37. 6 How. 344.

38. *The Florida*, 64 Fed. 159.

pany will not be liable for the consequences of his own negligence in stowing the goods.³⁹

Sec. 611. (§ 310.) The goods must be carried in the customary mode or according to the directions of the shipper.—All common carriers are bound to carry in the mode customary in their business, and usage is of great importance in determining whether the carrier has done his duty in this regard,⁴⁰ and as we have just seen, it will even justify the master of the vessel in departing from the rule which, in sea voyages, requires a stowage under deck. Where such usage is relied upon, it must, according to the general rule as to usages, be well established; and unless it be so general as to have become a matter of judicial knowledge, it must be proven. Usage, however, may be controlled by the directions of the owner of the goods, and such directions the carrier will disregard at his peril. When he accepts goods to be carried, with a direction on the part of the owner to carry them in a particular way or by a particular route, he is bound to obey such direction, and if he attempts to perform his contract in a manner different from that directed, he becomes an insurer, notwithstanding the exceptions in his contract,⁴¹ and even though the loss occurs on a connecting line.⁴² And if goods are marked in such a way as to indicate

39. *Pennsylvania Co. v. Kenwood Bridge Co.*, 170 Ill. 645, 19 N. E. Rep. 215, *reversing* 69 Ill. App. 145.

40. *Northern Pacific Ry. Co. v. Kempton*, — C. C. A. —, 138 Fed. 992; *Milroy v. Railroad Co.*, 98 Iowa 188, 67 N. W. Rep. 276; *Shelton v. Merchants D. T. Co.*, 59 N. Y. 258.

41. *Express Company v. Kountze*, 8 Wall. 342; *Streeter v. Horlock*, 1 Bing. 34; *Maghee v. R. R. Co.*, 45 N. Y. 514; *Dunseth v. Wade*, 2 Scam. 285; *Sleat v. Fagg*, 5 Barn. & Ald. 342.

42. *3 Railroad Co. v. Thomas*, 89 Ala. 294, 7 So. Rep. 752.

In *Uptegrove v. Railroad Co.*, 37 N. Y. Supp. 659, 16 Misc. 14, the goods were not shipped according to instructions and the carrier was held liable as an insurer although the loss occurred on a connecting line and the consignor knew that the carrier had restricted its liability to its own line.

Where, by mistake or otherwise, goods are delivered by the initial carrier to a connecting carrier other than the one designated by the contract, such initial carrier by its wrongful act of diverting the goods from their designated route, becomes an insurer of their safe delivery at destination. *Brown*

the manner in which the shipper desires them to be carried, or so as to give notice to the carrier that their safety requires that they must be carried in a particular manner, such marks must not be disregarded. Thus where a box containing a glass bottle filled with oil of cloves was delivered to the carrier marked, "Glass—with care—this side up," it was held that this was sufficient notice to him of the value and nature of the contents of the box to charge him with the loss of the oil occasioned by his disregarding such direction.⁴³ So in the case of *The Star of Hope*,⁴⁴ where packages of nuts were marked "in cabin state-room," and were, in disregard of such direction, stowed in the hold of the vessel, and were injured on the voyage in consequence, it was held to have been culpable negligence on the part of the master. On the other hand, it has been said that such a notice does not bind the carrier where it is not called to his attention and is not inserted in the bill of lading.⁴⁵ And when the carrier receives goods marked to a particular address and destination, it becomes his duty to forward them accordingly, without any further directions from the bailor.⁴⁶

So where the owner of a horse directed that he should be carried in a close car, but the direction was not obeyed, and the horse, in consequence of being carried upon an open car, was injured by the extreme coldness of the weather, the company was held liable, although the owner had assumed the risk of "all damage that might happen."⁴⁷ So where directions were

& *Haywood Co. v. Railroad Co.*, 63 Minn. 546, 65 N. W. Rep. 961.

A railroad company which undertakes to carry goods under an entire contract to deliver them at destination has no right, in order to suit its own convenience, to intrust their carriage to another carrier, and if it does so and the goods are injured while in the possession of such carrier, it becomes liable as an insurer for an injury resulting from its unauthorized act. Mere convenience cannot excuse the carrier for a

breach of its contract in such respect. *Seavey Co. v. Union Transit Co.*, 106 Wis. 394, 82 N. W. Rep. 255.

43. *Hastings v. Pepper*, 11 Pick. 41.

44. 17 Wall. 651.

45. *The New Orleans*, 26 Fed. 44.

46. *Witbeck v. Holland*, 45 N. Y. 13; *Rogers v. Wheeler*, 52 *id.* 262; *O'Neil v. Railroad Co.*, 60 *id.* 138.

47. *Sager v. Railroad Co.*, 31 Me. 228.

given to the carrier to forward the goods from the terminus of his own route by a particular line of boats, and upon tender of the goods to the agent of that line he declined to receive them, on the ground that he was prohibited by law from transporting freight of that description, whereupon the carrier forwarded them by a barge, and they were lost, he was held liable. It was said that, upon the refusal of the steamboat proprietors to receive the property, the carrier should either have communicated the fact to the plaintiff and awaited further instructions, or he should have relieved himself from liability by depositing the goods in a warehouse for safe keeping. "There is a class of cases," says the court, "in which an agent is justified by an unexpected emergency in deviating from his instructions, where the safety of the property requires it. In this instance no such exigency arose. The only inconvenience which would have resulted to the owner from compliance by the carrier with his known wishes would have been mere delay in transmitting the hemp to market, and he had notified the company that he would rather submit to this delay than to the hazard of tow-boat transportation at the close of the season of navigation. The primary duty of the agent is to observe the instructions of his principal, and when he departs from these he must be content with the voluntary risk he assumes."⁴⁸

Sec. 612. Same subject—When carrier not liable.—But the carrier will be justified in deviating from his instructions if, owing to an unexpected emergency, the safety of the goods requires it.⁴⁹ And if by a breach of the contract of carriage occurring on the stipulated route, it becomes impossible to get the goods to their destination by the stipulated route and within the time contemplated, the fact that the carrier, in order to decrease the sum for which he would be liable, sends the goods forward over another route than that provided for in the contract will not deprive him of the benefit of the exceptions to

48. *Johnson v. Railroad Co.*, 33 *Railway Co.*, 129 *Fed.* 480; *s. c.*, *N. Y.* 610. 135 *Fed.* 135.

49. *Empire State Cattle Co. v.*

his liability contained in the contract.⁵⁰ So if the injury to the goods results from the carrier relying upon and following the shipper's directions, the carrier will not be liable.⁵¹

Sec. 613. (§ 312.) Carrier's duty to transport by usual route.—It is the duty of the carrier to transport the goods by the usual direct route; and for any loss which a departure from such route may occasion to them, he is liable.⁵² Where, however, there are two customary routes, and the carrier is left free to choose between them, he may make his choice, without incurring increased liability, if there are no special reasons which make the route chosen unsafe. As where there were two customary or usual routes, one known as the inside or

50. *Foster v. Railway Co.* (1904) 2 K. B. 306, 73 L. J. K. B. 811.

51. A shipper of vegetables in the month of February during freezing weather, but not an unprecedented cold spell, gave directions to the carrier to leave open a vent in the car. As a result some of the vegetables were frozen. Freezing is not unusual in Texas during the month of February, and the court held it would presume the consignor knew such fact when he directed that the vent be left open, and that he was willing to take the risk of injury from cold weather. *Gillett v. Railway Co.*, 4 Tex. Ct. Rep. 414, 856, 68 S. W. Rep. 61.

52. *Express Co. v. Kountze*, 8 Wall. 342; *Merchants' Despatch v. Kahn*, 76 Ill. 520; *Crosby v. Fitch*, 12 Conn. 410; *Powers v. Davenport*, 7 Blackf. 497; *Hand v. Baynes*, 4 Whart. 204; *Davis v. Garrett*, 6 Bing. 716; *Smith v. Whitman*, 13 Mo. 352; *Phillips v. Brigham*, 26 Ga. 617; *Railroad Co. v. De Witt*, 1 Colo. App. 419, 29 Pac. Rep. 524.

Where a bill of lading provides

that the goods are to be carried from one point to another, *prima facie* a direct voyage is intended. If the vessel goes first, without necessity or reasonable excuse, into a port which does not belong to the natural or established course of the voyage, this is such a deviation as will authorize the consignor to recover the damages thus sustained in an action against the owner of the ship. Thus he may recover duties charged at destination because the goods did not come directly from the port of shipment. *Robinson v. Holst*, 96 Ga. 19, 23 S. E. Rep. 76.

A clause in a bill of lading that the cargo "is to be shipped wholly at the risk of the shipper, and that the owners assume no responsibility therefor during the voyage," refers to the voyage contemplated by the parties, and to deviations reasonably incident thereto and not to an additional voyage arbitrarily made by the order of the vessel owner. *Swift & Co. v. Furness, Withy & Co.*, 87 Fed. 345.

canal route, and the other as the outside, or ocean route, and the carrier was left free by his bill of lading to choose between them, and he chose the latter, and, being overtaken by a violent storm, the goods were injured, it was held that he was not liable for the damage occasioned by the dangers of the sea, although had he taken the other route it would, in all probability, not have occurred.⁵³ And so a departure, in accordance with the general and established usage of business, is not such a deviation as will make the carrier liable, even though the usage was not known to the particular shipper.⁵⁴

Sec. 614. (§ 313.) Same subject—Choice of routes when one dangerous.—If one of such customary and direct routes

53. *White v. Ashton*, 51 N. Y. 280; *Hinckley v. Railroad*, 56 N. Y. 429; *Simkins v. Steamboat Co.*, 11 Cush. 102; *Empire Trans. Co. v. Wallace*, 68 Penn. St. 302; *Glover v. Railroad Co.*, 95 Mo. App. 369, 69 S. W. Rep. 599.

The absence of special instructions given and acceded to by the carrier amounts to an assent that the carrier's usual course of business may be followed, and he may designate the route as his convenience may suggest. *Post v. Railway Co.*, 103 Tenn. 184, 52 S. W. Rep. 301, 55 L. R. A. 481.

Where nothing is said in the bill of lading as to any particular connecting route, the carrier may select the connecting route over which the goods shall be transported. A mere direction by the shipper that such goods shall go forward by some particular route will not alter the rule unless actually agreed to by the carrier. *Bessling & Co. v. Railway*, (Tex. Civ. App.) 80 S. W. Rep. 639.

But in *Sharp v. Clark*, 13 Utah 510, 45 Pac. 566, the defendant, a

common carrier, entered into a written contract to transport plaintiff's sheep from Milford, Utah, to Chicago, Ill., without stating any particular route. There was also a written contract made at the same time for the transportation of the plaintiff's servant to care for the sheep during transit. The passenger ticket given was to Omaha, Neb., and Council Bluffs, Iowa. The defendant carried the sheep by another route than that designated in the passenger ticket and thus prevented the plaintiff from having an opportunity to dispose of his sheep at Omaha. The court held that though the separate papers for the transportation of the sheep did not name any particular route, yet the passenger ticket named Omaha and Council Bluffs and by necessary implication there was an implied undertaking to carry the sheep through via Omaha and Council Bluffs.

54. *Hostetter v. Park*, 137 U. S. 30; *Pierce v. Railroad Co.*, 120 Cal. 156, 47 Pac. Rep. 874, 52 Pac. Rep. 302, 40 L. R. A. 350, citing

has become unsafe from accidental and temporary causes, the carrier, if informed of the fact, will be chargeable with negligence if he takes it, even though it may be more expeditious than the other. Such was the case in *Express Company v. Kountze*.⁵⁵ Gold dust was delivered to the carrier, at Omaha, to be transported to Philadelphia. There were two routes: one through Iowa, and the other through Missouri, the latter being the more expeditious, but unsafe, because of the disturbed condition of the country. The carrier, having attempted to convey the dust by the Missouri route, was robbed of it by a body of armed men, while in transit through that state, and was held liable, notwithstanding its contract provided against liability for losses or damage from such an occurrence, having been guilty of gross negligence in taking the more hazardous route under the circumstances.

So, also, if one of two routes is dangerous for the class of goods carried, and the other route is temporarily obstructed, the carrier will be liable if he forwards the goods by the dangerous route, without notifying the shipper, for any consequent loss. Thus where a railroad company contracted to carry oranges, and, owing to an obstruction in its usual route, it carried them without any instructions from the shipper to do so over another route passing through a country which at the particular season of the year was subject to frosts, and the oranges were thereby damaged, it was held that the company was liable.⁵⁶

Sec. 615. (§ 313a.) Same subject—Option as to routes to be exercised with regard to shipper's interest.—So where a contract for the transportation of goods gives the carrier an option between modes of transportation, this option must be exercised with regard for the interests of the shipper. To ex-

Hutch. on Carr.; *Caffin v. Aldridge*, 92 Tenn. 326, 21 S. W. Rep. 666 (1895) 2 Q. B. 648, 65 L. J. Q. B. 85, *affirming* (1895) 2 Q. B. 366, 64 L. J. Q. B. 736. 56. *Pierce v. Railroad Co.*, 120

55. 8 Wall. 342.

Cal. 156, 52 Pac. Rep. 302, 47 Pac.

See also, *Express Co. v. Jackson*, Rep. 874, 40 L. R. A. 350.

ercise the option to the disadvantage of the shipper, unless it is done in good faith and under circumstances which seem to require it, will be a breach of the contract;⁵⁷ and the burden of proof will be upon the carrier to show that he exercised the option reasonably under the circumstances. Thus if the carrier should adopt a mode of transportation which involved the payment of a higher rate of freight rather than a lower one, he must show, in order to justify his act, either that he asked for and obtained directions from the shipper or consignee to employ the more expensive mode, or that because of his inability to procure the means of shipment by the cheaper mode, it was reasonably necessary, in view of the exigencies of the particular case, to resort to the other and more expensive mode.⁵⁸

Sec. 616. Tempestuous weather may render deviation by vessel necessary.—As we have seen, circumstances may arise which render it necessary to depart from the usual course, and tempestuous weather, injuring a ship and rendering it necessary to put into some port of repair, is one of these circumstances. In selecting that port the master must not make any greater departure than is reasonably necessary, having in mind the interests of all parties concerned, but in determining what is reasonably necessary the question of expense may be taken into account.⁵⁹

Sec. 617. (§ 314.) The obligation to carry in the manner provided by the contract.—When the carrier has entered into a contract to carry the goods in a particular manner, or within a prescribed time, he will be held to a strict compliance with the terms of his agreement.⁶⁰ If, for instance, he undertakes to carry the goods by a particular vessel, and forwards them by another, though it be one of the same line, and the goods

57. *Blitz v. Steamboat Co.*, 51 (1891) 1 Q. B. 605, 60 L. J. Q. B. Mich. 558. 382.

58. *Stewart v. Comer*, 100 Ga. 60. *Post v. Railway Co.*, 103 754, 28 S. E. Rep. 461, 62 Am. St. Tenn. 184, 52 S. W. Rep. 301, 55 Rep. 353. L. R. A. 481, citing *Hutch. on*

59. *Phelps, James & Co. v. Hill, Carr.; Railway Co. v. Leibold*,

are lost, he will be liable. Goods were delivered to an express company, to be carried from New York to New Orleans, and the company gave a receipt for them, in which it was recited that the company undertook to carry them by a particular steamship. Afterwards, and before the goods were shipped, this vessel was withdrawn from the line, and did not make the contemplated voyage. The goods were sent forward by another vessel, which was wrecked on her voyage, and the goods were lost. "When it was ascertained," said the court, "that the particular vessel would not sail for New Orleans, and that therefore the boxes could not be sent by her, it was the duty of the defendants to notify the plaintiffs of that fact, and await their instructions."⁶¹ The forwarding of the goods by another steamer than that agreed upon, without the assent of the plaintiffs, or any notice to them of the intention so to forward them, was clearly not an execution of the agreement, and they are chargeable with the consequences of the unauthorized act."⁶² And where the agent of the proprietor

(Tex. Civ. App.) 55 S. W. Rep. 368.

61. See *Johnson v. N. Y. Cent. R. R.*, 33 N. Y. 610.

62. *Goodrich v. Thompson*, 44 N. Y. 324.

In *Louisville, etc. R. Co. v. Odill*, 96 Tenn. 61, 33 S. W. Rep. 611, 54 Am. St. Rep. 820, a quantity of potatoes were routed at the shipper's directions over the receiving carrier's line to a certain point and from thence over the line of another designated carrier to destination. The potatoes were carried by the receiving carrier to the point of intersection with the succeeding carrier's route and there tendered to such carrier. The succeeding carrier declined to accept them on account of a strike then prevailing over its road. Thereupon the first carrier

delivered the potatoes to another carrier not named in the contract, which line was as well equipped and as expeditious as the road over which the shipper had routed the potatoes. After such connecting carrier had received the potatoes and started them in transit, the strike spread to its connections and it thereupon took the potatoes back to a station on its line and sold them upon the belief that, being perishable, their disposition was for the best interest of the shipper. When informed of the sale, the shipper refused to accept the proceeds and brought suit against the initial carrier. No notice was given by the first carrier to the shipper that the succeeding carrier designated in the contract had refused to receive the potatoes, or that

of a line of vessels gave to the shipper a bill of lading for goods to be shipped by a particular vessel, which was the next of such vessels in the order of departure for the port of destination, it was held that such agent had authority to enter into such a contract; and the vessel being delayed and not arriving in time to depart in her regular order, and another vessel having been substituted in her place, and the goods sent by her, and lost by the perils of the sea, it was held the defendant had no authority to forward the goods by any other than the particular vessel named in the contract, and that, having done so, he made himself an insurer, and was liable for their loss.⁶³

An express provision of this nature in a written contract of carriage is not subject to modification or variance by the custom or usage of trade.⁶⁴

Sec. 618. (§ 315.) Same subject—Carrier liable for loss if contract not observed.—So where the carrier has agreed to transport the goods by land, he cannot carry them by water; nor by land, when he has agreed to carry them by water; nor by a sailing vessel when he has contracted to carry them by a steam vessel, without taking upon himself all the risk of their loss or damage. When the contract in the bill of lading was for transportation of freight "all rail" from Louisville to New

they had been sent over another road. The shipper could easily have been consulted by letter or wire, and the carrier was held liable for failure to give such notice, the court saying: "There is no doubt that when in case of unforeseen necessity, the safety of the shipment demands it, a deviation from the route agreed upon with the shipper may be made and will be justifiable, as for instance, forwarding perishable freight by rail when a storm prevents a boat from proceeding upon its voyage; but where the goods can be properly cared for and held until the shipper can be communicated

with, the carrier will not be justified in selecting another route without notice to him and instructions from him. . . . Unless justified by urgent circumstances, a deviation by the carrier will render it responsible for losses resulting, even from inevitable casualties, and the original carrier becomes, in effect, an insurer for the line he selects.

63. *Goddard v. Mallory*, 52 Barb. 87; *Wilcox v. Parmelee*, 3 Sandf. 610; *The Protection*, 102 Fed. 516, 42 C. C. A. 489.

64. *Louisville & C. Packet Co. v. Rogers*, 20 Ind. App. 594, 49 N. E. Rep. 970.

York, with an exception of the liability of the carrier for losses by fire in depot, and the freight was carried "all rail" as far as Philadelphia, and there delivered for further transportation to the defendant railroad company, by which it was carried to destination, but was transported for a portion of the distance in a steamboat instead of by rail, it was held that the carrier had, by failing to comply strictly with its contract, forfeited the benefit of the exceptions in the bill of lading; and the cotton having been burned in its depot after its arrival at New York, it was held liable. It was said that a literal performance of the contract would have been impossible, because it was necessary to cross both the Ohio and the Hudson rivers before New York could have been reached. But the contract, it was said, was to have a reasonable construction, and the necessity of crossing ferries in the course of the transportation must have been known to the parties, and water carriage, to this extent, must have been authorized from the necessity of the case, and the contract to carry by rail would have been substantially performed by the transportation by rail so far as was practicable; but that the carrying of the goods by steamboat from Amboy to New York was not a necessity; and while the defendant could not have sent them otherwise by its line, it could, upon seeing the direction in the bill of lading, have declined the service; but having undertaken it, it took upon itself also the obligation of the contract, and became an insurer of the safety of the goods when it failed to comply with its stipulations as to the mode of carriage.¹ And where a verbal contract was made by the shipper with an agent of a railroad company to transport goods "all rail," at "all rail" rates, from Cincinnati to New York, and the goods were carried to Baltimore by "all rail," and were there shipped on a steamer for New York, the carrier was held liable for the loss of the goods by the wrecking of the vessel in a storm at sea; because, the goods having been shipped under an agreement that they should be carried all rail, a loss occasioned by their being carried by sea, in viola-

1. *Maghee v. Camden & Amboy R. R.*, 45 N. Y. 514.

tion of such agreement, was no excuse for their non-delivery to the consignee.²

Sec. 619. (§ 316.) Same subject.—Following the same rule, it was held that the carrier was liable in damages for the consequent delay where the shipper directed that the goods should be carried by one sea route, and the carrier sent them by another route more exposed to the risk of delay.³ So where the carrier undertook to send the goods by a steam vessel, and sent them by a sail vessel, he was held to have become, by such a departure from his duty, an insurer of their safety, and the goods having been lost in a storm, he was held liable for their value;⁴ and the same rule was applied where, having undertaken to ship goods “by sail on the lake,” he sent them by steam and the goods were lost.⁵ So where a valuable parcel was delivered to the carrier to be forwarded by a certain specified coach, but the carrier, disregarding the instructions of the bailor, sent it by another coach, and it was lost, it was held that he was liable, although he would not have been liable had he sent it as directed and it had been lost, because the bailor had fraudulently concealed its value and no insurance had been paid upon it, according to the carrier’s notice, Bayley, J., saying that, “if the defendant had sent the parcel by the mail, in pursuance of his contract, I should have been of opinion that, under the circumstances of the case, he would not have been liable for the loss. But, having sent it by a different mode of conveyance, I am of opinion that he is liable.”⁶

Sec. 620. (§ 316a.) Same subject.—So where the carrier by his contract agreed that the goods should be transported without change of cars, but this agreement was not observed, it was held that the carrier was liable for a loss which ensued and

2. *Bostwick v. B. & O. Railroad*,
45 N. Y. 712.

4. *Wilcox v. Parmelee*, 3 Sandf.
610.

3. *Mallett v. Railway Co.*, (1899)
1 Q. B. 309, 68 L. J. Q. B. 256, 80

5. *Merrick v. Webster*, 3 Mich.
268.

Law T. (N. S.) 53, 47 Wkly. Rep.
334.

6. *Sleat v. Fagg*, 5 Barn. & Ald.
342.

could not claim the benefit of restrictions upon his liability contained in the contract which he had violated.⁷

And where a shipping contract provided that stock should be carried through to destination in the car in which they were loaded, the carrier was held liable for changing the stock during transit from such car to a smaller car whereby they were injured.⁸

Sec. 621. Liability of carrier where, notwithstanding an unauthorized deviation, the goods arrive on time.—If, notwithstanding an unauthorized deviation from his route, or a non-observance of his contract by the first carrier, the goods arrive on time at their destination, the consignee cannot, because of such unauthorized deviation or non-observance of the contract, refuse to receive them and claim a conversion by the first carrier. And this is true although the last carrier may have sold the goods illegally on the consignee's refusal to receive them. But the consignee is not thereby precluded from the right to recover from the first carrier such damages as are the proximate result of the deviation. Thus where in consequence of a deviation, the consignee failed to receive prompt notice of the arrival of the goods, their market value having in the meanwhile diminished, it was held that he was entitled to recover from the carrier for such diminution in value.⁹

Sec. 622. Construction of clauses in contracts of affreightment permitting deviations—Printed forms.—Where general words permitting deviations are used in a printed form, and such words are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract which is embodied in the printed form, the court will be justified, in construing the general words, in looking at the whole contract, and in limiting such general words to the main object and in-

7. *Stewart v. Transportation Co.*,
47 Iowa, 229.

9. *Southern Pacific Railroad Co.*
v. Booth, (Tex. Civ. App.) 39 S.

8. *Felton v. Live Stock Co.*, 22
Ky. L. Rep. 1058, 59 S. W. Rep.

744.

tent of the contract. General words in a printed form are intended to be used in relation to a variety of contracts of affreightment. In the case of a shipment by vessel, the name of the particular port of shipment, as well as the goods to be shipped, is usually left in blank, and the printed general words are treated as a liberty which is to attach to the particular voyage. But the main object and intent of the contract is the voyage agreed upon; and while the printed general words must not, in construing the contract, be discarded, it is well recognized that when considering what the main object and intent of the contract is, it is proper to bear in mind that a portion of it is on a printed form applicable to many voyages and is not specially agreed upon in relation to the particular voyage. Thus where the main object of a charter party was the carriage of oranges from Malaga to Liverpool, but the ship took in cargo at Burriana, a port about 350 miles from Malaga, and the shipowner sought to justify the act of proceeding to Burriana by reason of the following printed general words, "with liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo or passengers, or for any other purpose whatsoever," it was said by the court "that it would be to defeat what is the manifest object and intention of such a contract to hold that it was entered into with a power to the shipowner to proceed anywhere that he pleased, to trade in any manner that he pleased, and to arrive at the port at which the oranges were to be delivered when he pleased." It was further said that there is no difficulty in construing such a clause to apply to a liberty in the performance of a stipulated voyage to call at a particular port or ports in the course of the voyage, but it must be a liberty consistent with the main object of the contract—a liberty only to proceed to and stay at the ports which are in the course of the voyage, perhaps not in the course of the voyage in a literal geographical sense, but speaking in a strict business sense. The words "in any rotation" were held not to enlarge the

number of ports at which it would be justifiable for the vessel to touch during the course of her voyage.¹⁰

Sec. 623. Construction of clauses reserving leave to tow and assist other vessels.—A clause in a bill of lading reserving leave to “tow and assist vessels in all situations” does not justify an unnecessary deviation in rendering a salvage service by going to a distant port instead of the one most reasonably accessible in the particular circumstances of the case. The shipowner will be liable in damages for such unnecessary deviation if the cargo deteriorates in value or is damaged thereby.¹¹

Sec. 624. Carrier not liable if loss occurs through misconstruction of bill of lading by shipper.—The carrier, however, will not be liable for any loss occurring through a misinterpretation of the bill of lading by the shipper. Thus the steamship *Kansas* was one of the Warren line of steamships and was advertised to sail and did sail from Boston January 26, 1897. On January 23rd, a bill of lading was delivered to the libelants for thirty-two barrels of old metal to be transported by the *Kansas*, but the following clause was inserted in the bill of lading: “It is mutually agreed that, in case the whole or any part of the goods specified herein be prevented by any cause from going in the said steamship, the carrier shall have liberty to forward them by succeeding steamship or steamships.” The metal was received on the dock January 22nd. Owing to the fact that preference had to be given to perishable cargo, there was no room in the *Kansas* left for the metal, and it was shipped on the succeeding steamship, *Angloman*, which sailed four days later. The *Angloman* was totally lost through perils of the sea. The libelants insured their cargo on the *Kansas* on July 23rd for \$2,500.00, and had no insurance by any other ship. The insurance company refused payment, as they had insured by the *Kansas* only. The libelants were not

10. *Glynn v. Margetson & Co., L.* 11. *Schwarzchild v. Steamship R.* (1893) App. Cas. 351, 62 L. J. Co., 74 Fed. 257. See also, *In re Q. B.* 466, *affirming* (1892) 1 Q. B. Meyer, 74 Fed. 881.
337, 61 L. J. Q. B. 186.

personally informed that the goods had not gone on the Kansas until after the loss of the Angloman. They sought to recover the value of the merchandise lost, but the court held that if they supposed the contract to be an absolute engagement to carry the goods upon the Kansas, they relied upon an erroneous construction thereof, and not upon the contract. The libel was dismissed.¹²

Sec. 625. (§ 317.) The goods must be carried at and within the time agreed on.—If the carrier has agreed to carry the goods to their destination, or to the point of connection with the succeeding carrier, and there deliver them within a prescribed time, he will be held to a strict performance of his contract,¹³ and no temporary obstruction or even absolute impossibility will be a defense to an action for failure to comply with the engagement; for when a party, by his own contract, creates a duty which he engages to perform, he is bound to make it good, notwithstanding an accident or delay by inevitable necessity, because he might have provided against it by his contract;¹⁴ and this rule applies not only to the engagements of carriers but to the contracts of all persons. If a vendor of goods, for instance, absolutely engages to deliver them by a certain time, it will be no defense that he was prevented from doing so by the blockade of a port or by any other inevitable

12. *The Kansas*, 87 Fed. 766; *Hilton*, 19; *Deming v. Railroad*, 48 N. H. 455; *Hadley v. Clark*, 8 T. R. 259; *Harrison v. Railway Co.*, 74 Mo. 364, 371; *Chicago, etc. R. Co. v. Thrapp*, 5 Ill. App. 502; *Miller v. Railway Co.*, 62 Mo. App. 252; *Shelby v. Railway Co.*, 77 Mo. App. 205.

13. *Rudell v. Transit Co.*, 117 Mich. 568, 76 N. W. Rep. 380, 44 L. R. A. 415; *Stoner v. Railway Co.*, 109 Iowa, 551, 80 N. W. Rep. 569.

The first of two connecting carriers is liable for a failure under a contract to deliver the goods to the succeeding carrier within a given time or in time for a particular market. *Fox v. Railroad Co.*, 148 Mass. 220; *Pereira v. Railroad Co.*, 66 Cal. 92.

14. *Place v. Union Ex. Co.*, 2

Under the familiar rule that the case made by the declaration must be the case proven, although the evidence may tend to show a contract to carry within a prescribed time, a recovery cannot be had on that evidence where the only time alleged in the declaration is the

accident;¹⁵ nor that goods of the particular quality agreed to be delivered could not be had at the time when the contract was to have been executed.¹⁶

Sec. 626. (§ 318.) Same subject—Illustrations.—A forcible illustration of this principle is afforded by the case of *Parmalee v. Wilks*,¹⁷ which, though not a case turning directly upon the question of the duties and liability of a common carrier, was assimilated to such a case. The owners of a steamboat entered into a contract to tow a raft of logs for the plaintiff. They agreed to commence the service on the morning of a certain day, but, owing to an alteration in the voyage of the boat, the raft was not taken in tow until the evening of that day, and a storm arising during the night, whilst it was being carried to its destination, broke it up and scattered the logs. It was found on the trial that but for the delay the raft would have reached its destination before the storm arose. It was held that in such a case time was to be considered as of the essence of the contract; that the delay by the steamboat was in effect the same as a deviation by a common carrier, and that its owners were liable for the value of the logs by reason of the failure to start with the raft as had been agreed. And in the case of a common carrier, it has been held that if he undertake to carry a cargo to a blockaded port when he has knowledge of the blockade, no difficulty attending the performance of his contract can be set up as an excuse for its non-performance.¹⁸

Sec. 627. (§ 319.) Same subject—Not excused by circumstances beyond his control.—In *Harmony v. Bingham*,¹⁹ the carrier entered into a covenant to convey a large quantity of goods from New York to Independence, Missouri, in twenty-six days, or to pay at the rate of ten cents per one hundred

duty to carry within a "reasonable" time. *Express Co. v. Bratton*, 106 Ill. App. 563.

15. *Atkinson v. Ritchie*, 10 East, 530; *Spence v. Chadwick*, 10 Q. B. 517.

16. *Gilpins v. Consequa*, 1 Peters'

Ct. 85; *Youqua v. Nixon*, *id.* 221.

17. 22 Barb. 539.

18. *Medeiros v. Hill*, 8 Bing. 231.

19. 2 Kernan, 99; s. c. 1 Duer, 209.

pounds of the freight for every day's delay beyond the specified time, and also gave a bill of lading containing an exception of liability for unavoidable accidents. Owing to a freshet, a canal over which he usually transported goods westward was rendered impassable, and was not repaired so as to become navigable for several weeks. In consequence of this delay, the goods did not arrive at destination for some twenty days after the time specified in the contract. Having exacted the payment of the agreed freight, without making any deduction for the delay, according to the terms of the contract, upon the ground that he had been prevented by inevitable accident from sooner delivering the goods, the owner sued him upon the covenant, and he was held liable to damages according to his contract, although the delay had been occasioned by circumstances beyond his control.²⁰

20. In this case it was proven that there was another possible route, via New Orleans, by which the goods might have been sent, and that this was known to the parties when the contract was made. It did not therefore appear that a strict compliance with it had been made impossible by the accident to the canal. The contract to carry within a given time was also separate and distinct from the bill of lading, which latter contained the exception of "dangers of the railroad, fire, leakage and all unavoidable accidents." These exceptions were held to be in no wise inconsistent with the covenant as to the time of delivery, and to except only damage to the goods by unavoidable accident, and not the loss to the owner occasioned by the delay in the transportation. But if the carrier contracts to deliver within a certain time, he is still excused from delivering at all if the goods

are destroyed by the act of God or of the public enemy without negligence on his part. *Gage v. Tirrell*, 9 Allen, 299. Should not the same cause which, if it had destroyed the goods *in toto*, would have excused him altogether from their delivery, excuse a delay of delivery beyond the time fixed by the contract? And if by the same contract in which he agrees to carry within a certain time, certain dangers are excepted from a loss by which he would be excused altogether, ought not a prevention by the same dangers to excuse a later delivery than he has undertaken to make, unless his contract can be construed as an insurance that they will be delivered within the specified time, unless lost by the act of God or the public enemy, or the excepted dangers in the bill of lading? The general rule undoubtedly is, that a party who contracts to do a certain thing will not be excused

Sec. 628. (§ 319a.) Same subject—Shipper must not be in default.—But these contracts of the carrier to transport the goods at or within a certain time must be held subject to the condition that the shipper is not himself in default in not furnishing the goods for transportation at the time agreed upon. Thus, in one case it appeared that the defendant had under-

from its performance even by the act of God. As where a party contracted to build a house by a certain time, and when he had nearly completed it, it was destroyed by lightning. *School District v. Dauchy*, 25 Conn. 530. And where the vendor contracted to deliver the thing sold by a certain time, he was held not to be excused by lowness of the water in the river, which made performance by the time impossible. *Bryan v. Spurgin*, 5 Sneed, 681. But there are exceptions to the rule, as where, from the nature of the contract, the law will presume the possibility of a prevention by the act of God, as a condition in the contemplation of the parties at the time of the contract, as in the case of a stipulation for personal service, or for the performance of an act which the promisor alone can perform. *Boast v. Firth*, L. R. 4 C. P. 1; *Knight v. Bean*, 22 Me. 531; *Lakeman v. Polard*, 43 *id.* 463; *Fuller v. Brown*, 11 Metc. 440; *Ryan v. Dayton*, 25 Conn. 188. If, therefore, the carriage depended upon the personal service of the carrier, it would seem that he would be excused for not delivering within the stipulated time, if prevented by illness, death or any other act of God, unless his contract can be construed as an insurance of the delivery at the specified time. Be-

sides, the case of the common carrier stands on peculiar grounds. He is excused from his contract to carry the goods safely by the act of God or the public enemy, unless he waives the benefit of these exceptions by his contract, which we have seen he may do. His contract does not by law bind him to carry and deliver the goods at all events, and it would seem to admit of some question whether, upon principle, the same causes which will excuse him altogether from the delivery would not afford a valid excuse for delay beyond the time fixed by his contract. The contract to deliver within a certain time certainly cannot be more obligatory than the contract to convey safely. But where it appears from the contract that it was the intention of the parties that the carrier should be bound to deliver at all events within the specified time, or, in other words, that he has for a consideration insured such delivery, as would seem to have been the understanding in this case, he should undoubtedly be held to the contract as so intended.

It appeared also in the case that there was another possible route, and the canal could, no doubt, have been sooner repaired. So the carriage of the goods within the time was not made impossible by inevitable accident or the act

taken to transport "on board steamship Minnesota or Nevada, for Liverpool," a quantity of cotton which was then on its way to New York, but the date of arrival of which was uncertain. The Minnesota was advertised to sail on October 27; the Nevada a week later. The cotton reached defendant's pier on October 26, but a full cargo for the Minnesota was then on the dock and loading. The cotton was therefore shipped a week later on the Nevada, reaching Liverpool a week later than the Minnesota. During this week the price of cotton declined and an action was brought to charge the defendant for the delay. The court held, however, that the contract must be construed as an undertaking to carry on the Minnesota, provided the cotton reached there in a reasonable time for loading; that it did not arrive within a reasonable time; that the defendant was not bound to reject other freight to save room for the cotton, thereby running the risk of sailing with a short cargo, and that the shipment on the Nevada was justifiable.²¹

Sec. 629. Same subject—Carrier may agree to hold the goods for transportation until a future date.—The converse of the proposition that if the carrier has agreed to deliver the goods within a prescribed time he will be held to a strict per-

of God. *Beebe v. Johnson*, 19 Wend. 500. Another important feature of the case was that the parties had agreed upon the amount of damages in case of failure to comply, which showed clearly that the carrier was to take the risk, for an increased compensation, perhaps, of all accidents which might delay the carriage. He insured or warranted the delivery by a given time, which, as it seems, was a matter of great importance, under the circumstances, to the owner of the goods. And such should, no doubt, be the construction generally of contracts to carry within a

given time; but perhaps not necessarily always so. *Leavitt, J.*, in *Broadwell v. Butler*, 6 McLean, 296, seems to have thought, without, perhaps, an investigation of the subject or a reference to the case, that the act of God or the public enemy, or any of the dangers excepted in the bill of lading, would excuse a delay beyond the time, even where there was a stipulation that the goods should be delivered by a given time. It was not a question in the case, however, and cannot be relied upon as a decision.

21. *Fowler v. Steam Co.*, 87 N. Y. 190.

formance of his contract is also true. If the carrier receives goods for transportation, agreeing to hold them until a future date, or until the happening of an event, and forward them at once, damages resulting from this breach of his agreement may be recovered.²²

Sec. 630. (§ 319b.) Same subject—Implied authority of agent to agree to furnish cars on given day.—Connected with this subject is the question of the implied authority of the agent of a railroad company to furnish cars for the transportation of property upon a given day. In the case of a general or superior agent having control of such affairs, or of any agent expressly authorized, there could be, of course, no question; but in the case of local agents at the various shipping places along the lines, more question has arisen. As to these, however, the rule is well settled that a local agent, placed in charge of a station and given authority to receive and forward freight, has implied authority to bind his principal by an apparently reasonable agreement with a shipper to furnish proper cars in a sufficient number and on a given day for the transportation of the shipper's goods.²³ That the agent had, in fact, instructions not to make such agreements will make no difference if the shipper did not know of them, and the agreement was one within the apparent scope of the agent's author-

²² *Campion v. Railway Co.*, 43 Fed. 775, 11 L. R. A. 128.

²³ *Wood v. Railway Co.*, 68 Iowa, 491; *Harrison v. Railway Co.*, 74 Mo. 364; *Pruitt v. Railroad Co.*, 62 Mo. 527; *Gelvin v. Railway Co.*, 21 Mo. App. 273; *Easton v. Dudley*, 78 Tex. 236, 14 S. W. Rep. 583; *McCarty v. Railway Co.*, 79 Tex. 33, 15 S. W. Rep. 164; *Missouri Pac. Ry. Co. v. Graves*, (Tex. Civ. App.) 16 S. W. Rep. 102; *Deming v. Railroad Co.*, 48 N. H. 455; *Miller v. Railroad Co.*, 62 Mo. App. 252; *Wilson v. Railway Co.*, 66 Mo. App. 388;

Railroad Co. v. Waters, 50 Neb. 592, 70 N. W. Rep. 225; *Railway Co. v. Irvine & Woods*, 7 Tex. Ct. Rep. 374, 73 S. W. Rep. 540; *Pacific Express Co. v. Needham* (Tex. Civ. App.) 83 S. W. Rep. 22; *Choctaw, etc. Ry. Co. v. Rolfe*, — Ark. — 83 S. W. Rep. 870; *Railroad Co. v. Tison*, 116 Ill. App. 48.

But a local station agent has no implied authority to bind the carrier to furnish cars at any other station on the carrier's line than the one where he is employed. *Railway Co. v. Hodge*, 10 Tex. Civ. App. 543, 30 S. W. Rep. 829.

ity.²⁴ In one case²⁵ of this nature the court said of such an agent, "He was the only representative of the company at that station. He was placed there for the purpose of transacting its business at that place. He was authorized to contract, in its name, for the transportation of property of the kind in question, and had authority to receive it for shipment. Shippers had the right to assume, in the absence of information to the contrary, that he had authority from his principal to contract for the doing of whatever was reasonably necessary to be done in the shipment of such property. By placing him in charge of its business at that station, and empowering him to contract for the shipment of such property, it held him out as possessing the authority to contract with reference to all the necessary and ordinary details of the business. Within the range of that business, he was a general agent. . . . Shippers, as a rule, are required to deal with these agents in making contracts for the shipment of property. They are agents of the company's own selection, and are employed to represent and act for it; and to hold that contracts entered into by them, within the apparent scope of their authority, may be defeated by secret limitations upon their authority, would impose, in many cases, very grievous hardships upon those who are compelled to deal with them. The soundest considerations of public policy demand that the rule should be otherwise; and this view is well sustained by the authorities."

So it is within the implied power of a local agent to contract for the delivery of a car to a connecting carrier within a specified time;²⁶ and an agent of a railroad company, who has authority to place cars along the line of railway at points other than stations for the purpose of receiving freight, has power to make an agreement in behalf of the company to receive such

24. *Wood v. Railway Co.*, 68 Co. v. Hume, 6 Tex. Civ. App. 653, Iowa, 491 (overruling *Wood v.* 24 S. W. Rep. 915.

Railroad Co., 59 Iowa, 196); *Harrison v. Railway Co.*, 74 Mo. 364; **25.** *Wood v. Railway Co.*, 68 Iowa, 491.

Railway Co. v. Racer, 10 Ind. App. **26.** *Stoner v. Railway Co.*, 109 503, 37 N. E. Rep. 280; *Railway* Iowa, 551, 80 N. W. Rep. 569.

freight when deposited along the line of railway to await the arrival of the cars, notwithstanding he may not have authority to make a contract of affreightment.²⁷

Sec. 631. (§ 320.) Care to be taken of the goods in case of delay or accident in the course of the transportation.—If, during the transportation of the goods, any accident should happen to them from which damage is likely to ensue to the goods, it is the duty of the carrier to give to them all the reasonable care and attention which will prevent further damage and secure their preservation. Where coffee in barrels and boxes was being carried on the Mississippi river, in a barge, from New Orleans to St. Louis, and became wet from an accident to the barge, it was held to have been the duty of the carrier to open the boxes and barrels, if necessary, and dry the coffee, in order, as far as possible, to preserve it from further damage by being kept in its wet state for the rest of the trip.²⁸ Where packages of furs were being carried by steamboat from Cincinnati to Pittsburg, and by an accident to the boat they became wet, it was held to have been the duty of the carrier to unpack and dry them while on the voyage, and for not having done so he was held liable.²⁹ Where dressed poultry, packed with ice in boxes, was delivered upon the steamboat of the carrier, which was delayed by a fog, and during the delay the ice melted and the poultry was spoiled by the heat, the carrier was held liable, it being shown that his agent was informed of the nature of the freight, and knew that, under the circumstances, if not attended to, it would spoil; and it not being shown that any care or attention was bestowed upon it.³⁰ So where the carrier received a cask of brandy to carry, which leaked in the course of the journey, and, when his attention was called to it, he took no steps to prevent the leakage, and a considerable quantity was thereby lost, he was held liable on the ground that the loss had accrued from gross negligence.³¹

27. *Railway Co. v. Marchman*,
121 Ga. 235, 48 S. E. Rep. 961.

29. *Choteaux v. Leech*, 18 Penn.
St. 224.

28. *Bird v. Cromwell*, 1 Mo. 58.

30. *Peck v. Weeks*, 34 Conn. 145.

31. *Beck v. Evans*, 16 East, 244.

And the carrier has also been held liable where his servants stood by and allowed thieves and marauders to break into the cars without opposition and appropriate their contents.³²

Sec. 632. (§ 321.) Same subject.—When beans loaded upon a vessel became wet by the leaking of the vessel, caused by a collision which compelled the vessel to put back to port and lie there for some time for repairs, it was held to have been the duty of the master to unload the beans while in port, and dry them; and having proceeded on his voyage without having done so, and the beans having become greatly damaged by being permitted to continue wet for so long a time, he was held liable for the damage.³³ Where the bill of lading contained a stipulation that casks in which oil was contained should be wetted twice a week to prevent leakage, the carrier was held liable for loss by leakage because this was not done, although leakage was one of the excepted causes of loss contained in his contract; and without such stipulation, if the loss had occurred from the want of reasonable care in preventing such leakage, he would have been liable.³⁴

Sec. 633. Same subject.—Where a cargo, however, has been discharged for the purpose of reconditioning it, and the time such reconditioning would occupy and the cost that would have to be incurred would be out of all proportion to the value of the cargo, the master of a vessel may take these circumstances into consideration and proceed upon the voyage without waiting for the cargo to be put into a fit state for reshipment.³⁵

Sec. 634. (§ 322.) Care to be taken of live stock.—It is the duty of the carrier of live stock, in the absence of special contract, and when they are not accompanied by the owner or some agent of his whose duty it becomes to provide for them,

32. *Lang v. Railroad Co.*, 154 Pa. St. 342, 26 Atl. Rep. 370, 20 L. R. A. 360, 35 Am. St. Rep. 846.

33. *Notara v. Henderson*, L. R. 5 Q. B. 346; s. c. (Exch. Ch.) L. R. 7 Q. B. 225.

34. *Hunnewell v. Taber*, 2 Sprague, 1.

35. *The Savona* L. R. (1900) P. 252, 69 L. J. P. 95.

See also, *post*, §§ 647, 648.

to give them that attention which they require as living animals, and he cannot treat them as inanimate freight. They absolutely require ventilation and to be fed and watered; and if the carrier has not provided otherwise by contract with the owner when he accepts them for transportation, it becomes as obligatory upon him to care and provide for them in these respects, as their necessities may require, as to provide for them safe vehicles of transportation. If, for instance, a railroad company accepts hogs for transportation, which, from the crowded manner in which they are necessarily carried upon its cars, are liable to die from overheating, it is the duty of the agents of the road to apply water to them externally when this is found necessary to prevent such overheating, and if they fail to do so the company will be liable.³⁶ And there can be no doubt that if the carrier intrusted with a living animal of any description for transportation should suffer it to die from starvation or thirst, or for the want of ordinary care and attention in any respect which it required, he would be liable unless he should be relieved from the duty by contract with his employer.³⁷

36. *Illinois Cent. R. R. v. Adams*, 42 Ill. 474; *T. W. & W. R. R. v. Thompson*, 71 *id.* 434; *T. W. & W. R. R. v. Hamilton*, 76 *id.* 393; *Wallace v. Railway Co.*, 133 Mich. 633, 95 N. W. Rep. 750.

Where delay occurs during transportation it is the duty of the carrier, unless the shipper has expressly assumed the duty, to see that the property does not suffer injury, as to prevent hogs from "piling up;" and he cannot escape by alleging that the cars were overcrowded, if he accepted them with knowledge of their condition. *Kinnick v. Railway Co.*, 69 Iowa, 665.

So, though the shipper accompanies them, the carrier is bound, if requested, in case of accident

or delay, to put the cars in such a position that the shipper can get to them to attend to the wants of the animals; *e. g.* to haul the cars to a point, where they can be unloaded; and he cannot escape on the ground of a want of motive-power, if by reasonable diligence he could have obtained it. *Bills v. Railroad Co.* 84 N. Y. 5.

A carrier will be liable in damages if it smothers a hog by placing it in a steam-heated car when such a result could easily have been foreseen. *Express Co. v. Burke*, 94 Ill. App. 29; *s. c. Burke v. Express Co.*, 87 Ill. App. 505.

37. *South, etc. R. R. v. Henlein*, 52 Ala. 606.

Where a jack was shipped in a crate and during the transporta-

This rule is as applicable to carriers by water as to railroads;³⁸ and in the case of initial carriers, it will be no excuse that the effect of their negligence did not appear or develop until the stock was in the hands of a connecting carrier.³⁹

Sec. 635. Space for cattle must be sufficiently ventilated.—

In a contract for the transportation of cattle it is implied that the space allotted to the cattle shall be sufficiently ventilated; and if there is not sufficient ventilation in certain compartments of a vessel to enable a shipper to procure insurance upon the cattle to be placed therein, the shipper may refuse to ship them, and may recover damages for failure to transport them under the contract.⁴⁰ The mere fact, however, that a

tion got down in the crate, it was the duty of the carrier to remedy the situation by putting the jack on its feet. If sufficient force was not at hand it should have been procured. *Express Co. v. Emerson*, 101 Mo. App. 62, 74 S. W. Rep. 132.

Testimony tending to show that the bad condition of cattle at their destination was due to neglect and bad treatment during the journey is not inadmissible as opinion evidence where the witnesses are qualified by experience to express such opinions either by having been in the railroad service or by dealing in cattle. On the other hand testimony is also admissible that the cattle were not in fit condition to stand transportation by rail at the particular time of year on account of the change from a warm to a cold climate causing the cattle to become numb and lie down in the cars. *Railway Co. v. Arnett*, 111 Fed. 849, 50 C. C. A. 17.

In the absence of special contract, the carrier is bound to feed

and water live stock carried by it at proper intervals. *Railroad Co. v. Schuldt*, 66 Neb. 43, 92 N. W. Rep. 162; *Bosley v. Railroad Co.*, 54 W. Va. 563, 46 S. E. Rep. 613, 66 L. R. A. 871; *Burns v. Railway Co.*, 104 Wis. 646, 80 N. W. Rep. 927.

A common carrier of live stock is bound to furnish suitable water for such stock to drink. If he furnishes alkaline water to stock which he knows are unaccustomed to its use, and the stock, through its injurious effect, are damaged, the carrier will be responsible. *Railway Co. v. Mitchell* (Tex. Civ. App.), 85 S. W. Rep. 286.

The carrier, in the absence of any contract pertaining thereto, is bound to feed and water the stock during transit. *Southern, etc. R'y Co. v. J. W. Burgess & Co.*, —Tex. Civ. App. —, 90 S. W. Rep. 189.

38. *The Connemara*, 57 Fed. 314.

39. *Railway Co. v. Herring* (Tex. Civ. App.) 24 S. W. Rep. 939.

40. *The Alvah*, 77 Fed. 315, 23

number of cattle died on a particular voyage from no apparent cause is insufficient proof of bad ventilation as against the positive opinion of experts that the ventilation was sufficient combined with the fact that the vessel had previously carried a greater number of cattle in the same compartments with scarcely any loss.⁴¹

Sec. 636. Care due pregnant or sick animals.—In the absence of notice of facts sufficient to charge the carrier with knowledge that animals shipped are pregnant, such a condition should be regarded as a hidden or concealed defect, and the carrier, in handling such shipment, should not be charged with a degree of care or duty greater than that ordinarily used in handling animals.⁴² So a carrier is not liable for the death of an animal due to an attack of meningitis, or other similar disease, of which the carrier is not forewarned, when he does all in his power to protect the animal after its being so attacked.⁴³ But if the condition of the animal is plainly perceptible when shipped, or the carrier has knowledge of such facts as would lead a reasonable man to infer the condition of the animal, the carrier will be liable in damages if it does not give to the animal that treatment which its condition demands.⁴⁴

Sec. 637. Rule in Michigan with reference to caring for live stock.—The cases in Michigan on the obligation of caring for live stock during its transportation are so exceptional that they are separately treated. In accordance with the rule followed in that state that railway companies are not common carriers of live stock,⁴⁵ it is held that the shipper of live stock assumes the risks of injuries to the stock arising from unavoidable accidents and delays. Thus it is held that where the

C. C. A. 181, reversing *Morris v. The Alvah*, 59 Fed. 630.

41. *The Mondego*, 56 Fed. 268.

42. *Railway Co. v. Fagan*, (Tex. Civ. App.) 27 S. W. Rep. 887.

43. *Klair v. Wilmington Steamboat Co.*, 4 Pennewill 51, 54 Atl. Rep. 694.

44. *Railroad Co. v. Estill*, 147 U. S. 591, 37 L. Ed. 292, affirming on this point, *Estill v. Railroad Co.*, 41 Fed. 849; *McCune v. Railroad Co.*, 52 Iowa, 600.

45. See *ante*, § 340.

carrier has found it impossible, owing to causes beyond his control, to feed and water the stock, he will not be liable for damages arising from his failure to do so.⁴⁶ And it is held that the custom of the shipper to send a care-taker with his stock has become so universal that, in the absence of a special contract with the carrier making it the carrier's duty to care for the stock, the custom becomes a part of the contract of carriage, and that the shipper will assume all those risks of injuries resulting from his failure to comply with such custom. But if the carrier should fail to transport live stock within the time usually required, and should learn that the shipper had no one in charge of it, it would undoubtedly be the carrier's duty to feed and water the stock as the circumstances required.⁴⁷ And the duty to apply water to hogs externally when such is found to be necessary to prevent overheating has been held to be a part of the actual duty of transportation, apart from the stipulations in the contract.⁴⁸

Sec. 638. Carrier must provide suitable places for feeding and watering live stock.—"It is the duty of the railway companies to provide suitable places for feeding and watering live stock transported over their lines; and, if this is not done, they are responsible for any loss entailed or that occurs from such neglect or failure. The carrier is primarily bound to provide food and water for stock shipped over its line of railroad." So "it is held that a railroad company which transports live stock ought not only to have proper facilities and machinery for unloading the stock shipped over the company's line of road whenever, in the course of the transit, it may be necessary to unload them for exercise and refreshment, but also that it is the company's duty to unload, feed and water them at their journey's end, as well as along the route, if there be delay in delivering them to the consignee, in order to dis-

46. *McKenzie v. Railroad Co.*, Mich. 53, 66 N. W. Rep. 667, 63 137 Mich. 112, 100 N. W. Rep. 260. Am. St. Rep. 541.

47. *Heller v. Railway Co.*, 109 48. *Wallace v. Railway Co.*, 133 Mich. 633, 95 N. W. Rep. 750.

charge the carrier from liability, if the health or necessities of the animals require this to be done."⁴⁹

49. *Gulf, etc. Ry. Co. v. Wilhelm*, (Tex. Civ. App.) 16 S. W. Rep. 109; *Railroad Co. v. Adams*, 42 Ill. 474; *Railway Co. v. Thompson*, 71 Ill. 434; *Dunn v. Railway Co.*, 68 Mo. 268; *Harris v. Railroad Co.*, 20 N. Y. 232; *Cragin v. Railroad Co.*, 51 N. Y. 61.

This is now a duty imposed on railroads by statute in Texas, unless there is a special contract to the contrary. *International, etc. Railway Co. v. McRae*, 82 Tex. 614, 18 S. W. Rep. 672, 27 Am. St. Rep. 926; *Railroad Co. v. Brown*, (Tex. Civ. App.) 85 S. W. Rep. 44; *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.*, 41 Fed. 913.

If stock is delayed or carried beyond its destination, carrier must feed. *Dunn v. Railway Co.*, *supra*; *Bryant v. Railroad Co.*, 68 Ga. 805.

Unless agreed to the contrary, the carrier may unload cattle and change them from one car to another; and the fact that the owner goes along does not give him the right to dictate when and where the unloading shall take place. *McAlister v. Railroad Co.*, 74 Mo. 351.

As to the effect of the federal statute making it compulsory for a railroad company to water, feed, and rest cattle before they have been confined on the cars more than 28 hours (Act March 3, 1873, 17 Stat. 584, c. 252, U. S. Compiled Stat. 1901, p. 2995, § 4386) see the following cases:

Railway Co. v. Arnett, 126 Fed. 75, 61 C. C. A. 131; *United States v. Harris*, 85 Fed. 533, 29 C. C. A.

327, *affirming* 78 Fed. 290; *Railway Co. v. Hall*, 66 Fed. 868, 14 C. C. A. 153, 32 U. S. App. 60; *Newport News & M. Val. Co. v. United States*, 61 Fed. 488, 9 C. C. A. 579, 22 U. S. App. 145; *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.*, 41 Fed. 913; *Railroad Co. v. Gregg*, 25 Ky. L. Rep. 2329, 80 S. W. Rep. 512; *Hendrick v. Railroad Co.*, 170 Mass. 44, 48 N. E. Rep. 835; *Railway Co. v. Carlisle*, (Tex. Civ. App.) 78 S. W. Rep. 553; *Railway Co. v. Bank*, 92 Va. 495, 23 S. E. Rep. 935, 44 L. R. A. 449; *Burns v. Railway Co.*, 104 Wis. 646, 80 N. W. Rep. 927; *Chicago, etc. Ry. Co. v. Slattery*, — Neb. —, 107 N. W. Rep. 1045.

The federal statute does not in terms apply to express companies hiring their accommodations from railroad companies. But the existence of the statute, even though it does not subject express companies to a penalty, is strong evidence of the express company's duty to give a reasonable opportunity to the shipper's custodian, who accompanies animals on the train, to provide them with food and drink on their journey. Indeed, if there was no such statute, a contract to convey horses or cattle to be accompanied by a custodian would impliedly include an undertaking to allow the custodian to stop at reasonably convenient times and places to give them such food and drink as they need to keep them in good health. Not to permit the giving of such food and drink would be gross negligence. *Brockway v. Express Co.*, 168 Mass. 257,

And in loading or unloading the stock, due care must not only be taken by the carrier to see that the facilities for so doing are in good condition,⁵⁰ but the carrier must also take precautions against the animals injuring each other by kicking or otherwise.⁵¹

Sec. 639. Carrier's duty as to management of vehicles containing live stock.—The management of a train which may not be negligent as to inanimate freight may be grossly negligent when cars containing live stock are attached to it. Sudden jars or jerks may or may not be injurious to inanimate goods, depending upon the nature of the goods and the manner in which they are packed, but sudden jars or jerks are almost certain to injure live stock. A railroad company is therefore guilty of gross carelessness in making a "flying switch," whereby a freight car is kicked violently against another containing horses thereby injuring them.⁵² So where a mare was injured by a jarring of the car, the injury was said to have resulted from gross negligence since such an injury could not have happened if the employes of the railroad company conducting the switching, had been in the exercise of due care and caution.⁵³ And whether an animal has been thrown down in the car and injured by the negligent manner of moving the car is a question for the jury.⁵⁴

Along the same line of reasoning, it has been held that where live stock became greatly frightened during a journey, and in imminent danger of being injured or killed, and the shipper requested the conductor to have his car set off at an inter-

47 N. E. Rep. 87; s. c. 171 Mass.
158, 50 N. E. Rep. 626.

A failure to comply with the federal statute requiring that live stock shall not be confined for a longer period than 28 hours is negligence *per se*. Reynolds v. Railway Co., — Wash. —, 82 Pac. 161. A provision in the shipping contract in conflict with the provisions of such statute, is void. Reynolds v. Railway Co., *supra*.

50. See *ante*, § 510.

51. Loeser v. Railway Co., 94 Wis. 571, 69 N. W. Rep. 372.

52. Chicago, etc., Railway Co. v. Calumet Stock Farm, 96 Ill. App. 337; *affirmed*, 194 Ill. 9, 61 N. E. Rep. 1095, 88 Am. St. Rep. 68.

53. Railroad Co. v. Grimes, 71 Ill. App. 397.

54. Railroad Co. v. Light, 39 Ill. App. 530.

mediate station, a refusal to do so, although there was a reasonable opportunity to have complied with the shipper's wish, rendered the railroad company liable.⁵⁵

Sec. 640. Shipper may assume duty by contract to care for live stock in transit.—The care of live stock while being transported is a mere incident to its transportation, and the liability of transportation agencies to afford such care accrues to them merely as bailees, in common with other bailees, and not strictly as common carriers. They are therefore permitted to contract against this liability, and it is well settled that a common carrier may contract that the shipper shall accompany his live stock, unload, water and feed it. And where the shipper so contracts to care for his stock, damages resulting from his failure to comply with the contract cannot ordinarily be recovered from the carrier, although it seems that there should be a consideration in the form of a reduced rate or otherwise for this assumption of risk by the shipper.⁵⁶

Sec. 641. Same subject—But carrier must afford shipper reasonable opportunity and facilities for performing his contract.—But even though, by virtue of the contract under which the animals are carried, it is the duty of the shipper to attend the animals, provide for their wants and protect them from injury to themselves, yet if the carrier fails or refuses to furnish the shipper reasonable opportunities and facilities for perform-

55. *Coupland v. Railroad Co.*, 61 Conn. 531, 23 Atl. Rep. 870, 15 L. R. A. 534.

56. *Railway Co. v. James*, 117 Ga. 832, 45 S. E. Rep. 223; *Railroad Co. v. Cauthen*, 115 Ga. 422, 41 S. E. Rep. 653; *Railway Co. v. Rogers*, 111 Ga. 865, 36 S. E. Rep. 946; *Georgia R. & B. Co. v. Reid*, 91 Ga. 377, 17 S. E. Rep. 934; *Boaz v. Railroad Co.*, 87 Ga. 463, 13 S. E. Rep. 711; *Grieve v. Railroad Co.*, 104 Iowa, 659, 74 N. W. Rep. 192; *Hengstler v. Railroad Co.*, 125 Mich. 530, 84 N. W. Rep. 1067;

Duvenick v. Railroad Co., 57 Mo. App. 550, citing *Hutch. on Carr.*; *Railroad Co. v. Schuldt*, 66 Neb. 43, 92 N. W. Rep. 162; *Paul v. Railroad Co.*, 70 N. J. L. 442, 57 Atl. Rep. 139; *Lewis v. Railroad Co.*, 70 N. J. L. 132, 56 Atl. Rep. 128; *Railway Co. v. Edins* (Tex. Civ. App.), 83 S. W. Rep. 253; *Railway Co. v. Hunt* (Tex. Civ. App.), 81 S. W. Rep. 322.

But the failure of the shipper to accompany his stock as he has agreed to do is not a defense to an action against the carrier, unless

ing the duties which he has undertaken, the carrier will be liable for the injury thereby sustained.⁵⁷

The affording of reasonable opportunities for rest, food and water, however, does not mean that the carrier is required to afford such opportunities upon a mere request by the shipper without regard to the reasonableness or necessity of the demand.⁵⁸

Sec. 642. The failure of the shipper to furnish a caretaker does not excuse any subsequent negligence on the part of the carrier.—The fact that the shipper of live stock agrees to furnish a care-taker, and fails to do so, does not exonerate the carrier from a performance of the contract on his part. The carrier is still bound to carry the stock to destination without unreasonable delay. And since the agreement to be performed by the shipper does not go to the whole or a substantial part of the consideration of the contract, and is not precedent to the obligation of the carrier to transport the stock, the failure of

such failure has contributed to the injury. *Louisville, etc., R. Co. v. Smitha*, — Ala.—, 40 So. Rep. 117.

57. *Nashville, etc., Ry. Co. v. Heggie*, 86 Ga. 210, 12 S. E. Rep. 363; *Comer v. Stewart*, 97 Ga. 403, 24 S. E. Rep. 845; *Railway Co. v. Pratt*, 15 Ill. App. 177; *Railway Co. v. Eblen*, 24 Ky. L. Rep. 1609, 71 S. W. Rep. 919; *Smith v. Railroad Co.*, 100 Mich. 148, 58 N. W. Rep. 651, 43 Am. St. Rep. 440; *Johnson v. Railway Co.*, 69 Miss. 191, 11 So. Rep. 104, 30 Am. St. Rep. 534; *Lowenstein v. Railroad Co.*, 63 Mo. App. 68; *Welch v. Railway*, — N. Dak.—, 103 N. W. Rep. 396; *Railway Co. v. Daggett*, 87 Tex. 322, 28 S. W. Rep. 525, *reversing* (Tex. Civ. App.) 27 S. W. Rep. 186; *Railway Co. v. Musick* (Tex. Civ. App.), 80 S. W. Rep. 673; *Railway Co. v. Dunn* (Tex. Civ. App.), 78 S. W. Rep. 1080; *Railway Co. v. Byers Bros.*, 7 Tex. Ct. Rep. 244, 73 S. W. Rep. 427; *Railway Co. v. Leibold* (Tex. Civ. App.), 55 S. W. Rep. 368; *Railway Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. Rep. 349; *Railway Co. v. Ivey* (Tex. Civ. App.), 23 S. W. Rep. 321; *Railway Co. v. Bank*, 92 Va. 495, 23 S. E. Rep. 935, 44 L. R. A. 449; *Burns v. Railway Co.*, 104 Wis. 646, 80 N. W. Rep. 927; *Abrams v. Railway Co.*, 87 Wis. 485, 58 N. W. Rep. 780, 41 Am. St. Rep. 55; *Olds v. Railroad Co.*, 94 N. Y. 924. The carrier is liable if he does not give sufficient time or opportunity to care for the stock or if he misleads the shipper into believing that the brakemen are caring for it. *Dawson v. Railway Co.*, 76 Mo. 514.

58. *Railway Co. v. Clark* (Tex. Civ. App.), 79 S. W. Rep. 827.

the shipper to perform his agreement will not excuse the carrier from caring for the stock and unloading it at the shipper's expense.⁵⁹ If, therefore, the carrier has knowledge of the failure of the shipper to furnish a care-taker, his omission to care for the stock at the shipper's expense will be such negligence as will render him liable for any resulting injuries.⁶⁰ But knowledge on the part of the carrier that the shipper has omitted to furnish a care-taker is essential to charge him with liability for a failure to care for the stock; and such liability cannot therefore commence until the carrier has actual notice, or learns of such other facts as would lead a reasonable person to infer that a care-taker has not been furnished.

Sec. 643. Carrier liable for his negligence in loading or unloading stock notwithstanding contract that shipper shall do so—Effect of negligence by shipper.—If, notwithstanding a provision in the bill of lading that the shipper shall load and unload his stock, the carrier himself undertakes to do so, he will be liable if injuries result through his negligent performance of the act.¹ And the fact that the shipper is present at the time will be immaterial.²

So if the shipper voluntarily, or in accordance with the contract, undertakes to oversee and care for his stock during transportation, he cannot recover for injuries arising through his negligence in caring for the stock, though the contract in no manner exempts the carrier from liability.³

59. *Spalding v. Railroad Co.*, 101 Mo. App. 225, 73 S. W. Rep. 274. etc., *R. Co. v. Smitha*, — Ala. —, 40 So. Rep. 117.

60. *Milan v. Railway Co.*, 58 S. C. 247, 36 S. E. Rep. 571; *Railroad Co. v. Williams*, 61 Neb. 608, 85 N. W. Rep. 832, 55 L. R. A. 289; *Chicago, etc., Ry. Co. v. Slattey*, — Neb. —, 107 N. W. Rep. 1045. 1. *Normile v. Railroad & Navigation Co.*, 41 Ore. 177, 69 Pac. Rep. 928; *Railway Co. v. Kingsbury* (Tex. Civ. App.), 25 S. W. Rep. 322; *Railway Co. v. Dolan* (Tex. Civ. App.), 85 S. W. Rep. 302; *Railway Co. v. White* (Tex. Civ. App.), 80 S. W. Rep. 641.

See also *Railway Co. v. Sanders & Russell*, 25 Ky. L. Rep. 2333, 80 S. W. Rep. 488.

If the carrier has knowledge that the shipper is not accompanying his stock, he must give the stock proper attention. *Louisville,*

2. *Railroad Co. v. Sutherland*, 89 Va. 703, 17 S. E. Rep. 127.

3. *Burgher v. Railroad Co.*, 105 Iowa, 335, 75 N. W. Rep. 192.

Sec. 644. Negligent delay by carrier ordinarily no excuse to shipper for refusing to comply with his contract to care for the stock.—A negligent delay by the carrier in transporting the stock will ordinarily afford the shipper no excuse for abandoning his special undertaking to care for the stock. It would be the duty of the shipper, under such circumstances, to avoid as far as possible, by the use of such reasonable means as are at his command, the consequences of the carrier's negligent delay; and he would only be excused from the performance of this duty where the reasonable cost of the means at his command, added to the damages which would probably not be averted by their use, would equal or exceed the damages which could reasonably be expected to flow from the negligent delay.⁴

Sec. 645. (§ 323.) Duty of carrier in general to avert injury to goods transported.—Safe custody of the property intrusted to him is as much the duty of the carrier as its conveyance and delivery. His contract is to deliver in good order, and if the vessel upon which the goods are being carried is stranded, or if there be an interruption of any kind, so that he cannot proceed with his journey, whether it be by land or by sea, he is bound to use all the means at his command, and all possible diligence for their preservation;⁵ and if they become injured, for the want of such efforts to preserve them, the loss will be attributed to his negligence, and not to the immediate or proximate cause of the loss or injury. And when the vessel upon which the goods are being carried is disabled, and the goods are of too perishable a nature to await her repair, it is the duty of the master to procure another vessel if it can be done, and transport them at once to destination; and in that

4. *Railway Co. v. Daggett*, 87 Tex. 322, 28 S. W. Rep. 525, *reversing* (Tex. Civ. App.), 27 S. W. Rep. 186; see also *Railway Co. v. Arnold*, 16 Tex. Civ. App. 74, 40 S. W. Rep. 829.

5. See *ante*, §§ 5, 278, 309.

Where the shipper gives direc-

tions to ice a car containing meat, if there is an unreasonable delay in transporting the car, the carrier would be bound, if necessary to preserve its contents, to ice the car. *Railroad Co. v. Dorsey*, 30 Tex. Civ. App. 377, 70 S. W. Rep. 575.

event, he will be entitled to charge the goods with the increased expense of their preservation.⁶

Sec. 646. (§ 324.) Same subject—The rule stated.—In short, the conclusion to be drawn from all the cases upon this subject is, that whenever the situation or condition of the goods, from accident or from any cause, becomes such as to require especial care or attention, the carrier must put himself in the place of their owner, and do for them all that might reasonably be expected of a prudent and careful person, and if necessary, it would be his duty to incur any expense in their preservation which their value would justify, and which their condition might make necessary. His contract and his obligation is not only to carry the goods, but to carry them safely; and when they become exposed to the danger of deterioration or destruction from their own inherent infirmity or from any cause for which the carrier is not accountable, the law makes it his duty to employ at least a reasonable degree of skill and diligence to preserve them, and if he fail to do so, it will be accounted negligence, and he will be liable for the loss, though the actual proximate cause of it may be one for which, but for his negligence, he would be in no wise responsible. But a reasonable degree of care and diligence under the circumstances as they then present themselves is all that can be required. “There is an *ex post facto* wisdom,” say the supreme court of Ohio,⁷ “which, after everything has been done without success, can suggest that something else should have been attempted, but this is a sagacity much more astute than ordinary human foresight, and can hardly furnish a fair rule by which to determine the propriety of what has been done in good faith and with judgment exercised under the best lights afforded.”

Sec. 647. (§ 325.) But the carrier is not bound to suspend his voyage to preserve the goods.—The carrier is not, however, compelled to suspend or delay his voyage in order to bestow such needed care upon the goods. Where wheat was being

6. *Propeller Niagara v. Cordes*,
21 How. 7.

7. *Express Co. v. Smith*, 33 Ohio
St. 511.

conveyed upon the river in a barge, towed by a steamboat, and the carrier was overtaken by a storm, which caused the waves to break over the barge and wet the wheat, whereby it became damaged, one of the grounds upon which it was claimed that the carrier was liable was, that, after the wheat had become wet, he did not stop his boat and unload and dry it. But it was held that, however the rule in such a case might be in regard to vessels at sea, and where the whole cargo might belong to the same owner, it could not be tolerated in the navigation of our rivers by steamboats carrying the goods of many owners in every cargo, that the carrier should be required to suspend the voyage whenever a portion of the goods being carried had met with an accident which could not be repaired, or the effects of which could not be prevented without such delay. And as the wheat in this case could not have been dried without unloading the barge, which would have required considerable delay, the carrier was excused.⁸

Sec. 648. (§ 326.) Same subject.—The same rule has been applied to sea-going vessels. It was held that, if goods needed drying or exposure to the air while the ship was lying in port, or if such attention as they might need would have required only a short delay in the departure of the ship, from which no serious injury could have resulted, it was the duty of the master to incur the delay; but that, if an accident happened to the ship whilst upon her voyage, it was not the duty of the master to seek a port or to suspend his voyage in order to give such attention to the goods. But the carrier was held liable, because, being in port and awaiting repairs, he failed to dry the goods, although it might have required their being unloaded from the ship.⁹

Sec. 649. (§ 327.) Preference may be given to perishable goods already received.—As between different shippers, the carrier, as we have seen, cannot give preferences or show favors

8. *Steamboat Lynx v. King*, 12 Q. B. 346; s. c. (Exch. Ch.) L. R. Mo. 272.

7, Q. B. 225.

9. *Notara v. Henderson*, L. R. 5

in the order in which the goods accepted by him shall be carried. But it has been held that, if he has accepted more freight than he can immediately forward with the means of transportation at his command, and that therefore a portion of it must be delayed, and that it consists of two kinds, one perishable and the other not, he should give the preference to that which is perishable. Such goods are said to require more care and attention than those which are not perishable, and if either must be delayed, it should be those of the latter description. The carrier has therefore been held excusable for making the discrimination,¹⁰ and not liable for the consequent damages, when the safety of the goods of a perishable nature required it.¹¹ And in *The Michigan Central Railroad v. Burrows*,¹² it was held that the giving the preference to goods for the relief of the sufferers by the great Chicago fire was not such a discrimination against the shippers of other freight as to make the carrier liable for negligence in not forwarding freight in the order in which it was received. All general rules, it was said, must yield to a great public necessity.

Sec. 650. (§ 327a.) So preference may be given to preservation of life.—So it is clear that considerations of the safety of human life must, in an emergency, prevail over those demanding the protection of property. An interesting illustration of this is found in a case in Pennsylvania.¹³ There it appeared that three car-loads of household goods had been transported over the railroad until they reached a small station where they were to be transferred to a branch line for the point of destination. The cars reached this station at half-past eleven in the morning, but as the train on the branch line did not leave till afternoon, the cars were run onto a siding in the usual way

10. *Peet v. Railroad*, 20 Wis. Cent. R. R. *v. Burrows*, 33 Mich. 594; *Great Western R. R. v. Burns*, 6; *McAndrew v. Whitlock*, 52 N. Y. 40.
60 Ill. 284.

11. *Tierney v. Railroad*, 10 Hun, 12. *Supra*.

569, *affirmed*, 76 N. Y. 305; *Marshall v. Railroad*, 45 Barb. 502, 13. *Pennsylvania R. R. Co. v. Fries*, 87 Pa. St. 234.
affirmed, 43 N. Y. 660; *Michigan*

to await the departure of the latter train. For several days previous forest fires had been raging in the woods in this vicinity, but had been so far subdued that no special anxiety was felt for the safety of the town. Between twelve and one o'clock, however, the wind sprang up, which rapidly increased into a gale, defying all attempts to check it, and destroying the town and most of the property of its citizens in about two hours. The railroad company lost nearly all its property, its depot and a large number of cars. The cars in question were burned on the siding, though an attempt was made to get them out which was prevented by the heat and smoke. An action was brought to charge the company with the value of the household goods. "The only point seriously pressed," said the court, "was that the company were guilty of negligence in not getting the cars off after the fire commenced. Upon this point there was at most but a scintilla of proof. Negligence is the absence of care according to the circumstances. The circumstances here, as has already been said, are unusual. The company was not bound to have an extraordinary force on hand, for they had no reason to anticipate such a disaster. It is too much to expect every man to act with coolness and judgment in the midst of such an appalling scene. It is clear, however, that the employees of the company did all that could be reasonably expected of them to save life and property. A portion of their time was employed in aiding women and children to escape. A large number were taken in the cars to a place of safety. Had they turned their entire attention to plaintiff's property, neglected all other duties, and left helpless women and children to their fate, it is just possible they might have succeeded in getting the three cars off the siding. They were not obliged, however, to sacrifice every feeling of humanity to the preservation of plaintiff's property, and had they done so the evidence does not show that it would have been successful. Had the company preserved its own property at the expense of plaintiff's, there would have been more reason to charge them with negligence."

Sec. 651. (§ 328.) Time within which the goods must be carried.—As to the time within which the carrier is bound

to complete the transportation of the goods when no time is expressly agreed upon, the rule cannot be more satisfactorily laid down than that it must be done with all convenient dispatch, with such suitable and sufficient means as he is required to provide for his business, which is commonly defined as a reasonable time.¹⁴ This duty to deliver within a reasonable time is one engrafted by the law upon the principal contract, which is to carry safely.¹⁵ But as to this implied contract or duty, his responsibility is only that of an ordinary bailee for hire, and if he fail in the performance of it, he becomes liable for only such damages as the bailor may have suffered by his negligence. Although he may have delayed the carriage for an unreasonable

14. *Cincinnati R'y Co. v. Case*, 122 Ind. 310; *Hewett v. R'y Co.*, 63 Iowa, 611; *McGraw v. Railroad Co.*, 18 W. Va. 361; *Vicksburg, etc. R. Co. v. Ragsdale*, 46 Miss. 458; *Denny v. Railroad Co.*, 13 Gray, 481; *Philadelphia, etc., R. Co. v. Lehman*, 56 Md. 209; *Mina v. Steamship Co.*, 23 Fed. Rep. 915; *The Prussia*, 100 Fed. 484; *Railroad Co. v. Berry*, 116 Ga. 19, 42 S. E. Rep. 371, citing *Hutch. on Carr.*; *Denman v. Railroad Co.*, 52 Neb. 140, 71 N. W. Rep. 967; *Railroad Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. Rep. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579; *Railway Co. v. Porter*, 25 Tex. Civ. App. 491, 61 S. W. Rep. 343; *Railway Co. v. Josey*, 6 Tex. Ct. Rep. 472, 71 S. W. Rep. 606; *Railroad Co. v. Young*, 6 Tex. Ct. Rep. 508, 72 S. W. Rep. 68; *Railway Co. v. Beattie* (Tex. Civ. App.), 88 S. W. Rep. 367; *Ryand & Rankin v. Railway Co.*, 55 W. Va. 181, 46 S. E. Rep. 923, citing *Hutch. on Carr.*

The brother of a deceased person, who undertakes to pay for the transportation of his body from the place of his death to that of

his burial, has such an interest in the dead body as entitles him to damages for an injury to it by the negligent delay of the carrier while transporting it for hire, and he may recoup such damages when sued by the company to recover for such transportation. *Beam v. Railway Co.*, 97 Ill. App. 24.

Mere rush of business is no excuse for a failure to transport cattle with reasonable dispatch. *Texas, etc., R'y Co. v. Felker*, — Tex. Civ. App. —, 90 S. W. Rep. 530.

15. Fact that goods are received on Sunday does not relieve carrier from duty to transport with reasonable dispatch. *Philadelphia, etc. R. v. Lehman*, 56 Md. 209.

Notwithstanding mere delay is not evidence of negligence in transportation (*Stanard Milling Co. v. Transit Co.*, 122 Mo. 275, 276, 26 S. W. 704), yet, where the fact of delay is supplemented by evidence of the cause, it may show that it was negligence. *Wright v. Railway Co.*, — Mo. App. —, 94 S. W. Rep. 555.

length of time, the bailor is still bound to receive the goods, when tendered, where the delivery is required to be made, and cannot refuse them and hold the carrier liable for their value. And though the carrier may delay ever so long, the owner cannot charge him with a conversion, or for value of the goods, if they are safely kept, unless they have been demanded of the carrier and their delivery refused. But if by the unreasonable delay they have deteriorated or their market value has fallen, or they arrived too late for the market, he may hold him liable for the damages.¹⁶ And in an action to recover such damages, he may

16. *Scovill v. Griffith*, 2 Ker. 509; *Davis v. Garrett*, 6 Bing. 716; *Ellis v. Turner*, 8 T. R. 531; Story on Bail, § 509; *Hackett v. Railroad*, 35 N. H. 390; *Hawkins v. Hoffman*, 6 Hill, 586; *Railway Co. v. Bryan* (Tex. Civ. App.), 28 S. W. Rep. 98; *Railway Co. v. Tyler* (Tex. Civ. App.), 81 S. W. Rep. 826.

Mere failure to deliver, or to return on demand, because of loss, does not constitute a conversion. *Goldbowitz v. Metropolitan Express Co.*, 91 N. Y. Supp. 318.

"Unless there is an absolute denial by the defendant of plaintiff's right to a return of the goods, or the excuses for non-delivery are unreasonable, inconsistent, or made in bad faith, there can be no conversion by a common carrier, even upon clear proof of demand and failure to deliver." *Rubin v. Wells Fargo Express Co.*, 85 N. Y. Supp. 1108.

Where property in the hands of a common carrier is not delivered within a reasonable time after it has reached its destination, the carrier, in the absence of any legal exemption and after demand has been made and delivery refused, is liable for a conversion of the property. The consignee, under such

circumstances, may elect to waive all title to the property and sue for the conversion, and after he has done so, a subsequent tender by the carrier will not be available to it as a defense; the title to the property then being in the carrier, it is not subject to an attachment at the suit of a creditor of the consignee. *Hamilton v. Railway Co.*, 103 Iowa, 325, 72 N. W. Rep. 536.

A carrier of summer goods delivered to it on July 10 and not delivered by it in New York until August 8, when the season for the sale of them is over, is liable for the full value of the goods if they have become worthless from negligent exposure to moisture. *Bauman v. Railroad Co.*, 71 N. Y. S. 632, 35 Misc. 223.

A delay in the shipment of stock from Thursday to Wednesday of the following week, due to the failure of the carrier to take the loaded car forward in time for Friday's market, is unreasonable. *Railroad Co. v. Simmons*, 49 Ill. App. 443.

A delay from Friday at 6 P. M. to Saturday at 4 A. M., by which goods arrived too late for Saturday's market, is unreasonable.

recover for any reasonable expense to which he has been put by the delay.¹⁷ But where the carrier has been guilty of a negligent delay, he cannot be held responsible for damages occasioned by the delay of the shipper in unloading the goods at their destination, although such delay would not have occurred but for the carrier's former delay.¹⁸

So a mere delay in transportation, when no demand for the return of the goods has been made, will not constitute such a wrongful detention as will sustain an action of replevin. There would be lacking in such a case the element essential to replevin of either a taking or a wrongful detention upon demand.¹⁹

Sec. 652. (§ 329.) Same subject—What time reasonable.—

What is a reasonable time must be determined by the length of the journey, the mode of conveyance, the weather, the state of the roads, the season of the year, the nature of the goods, the amount of business, if from any cause there should be an unusual temporary influx of freight, and any other circumstance which may properly be taken into consideration by a jury in finding whether the carrier has been guilty of unnecessary and improper delay; for the question must always be one of fact. What might have been considered extraordinary expedition in the carriage between two places at one time might, by a change in the mode of conveyance, be regarded at another time inexcusable delay. The same distance, by one mode of carriage, may, in one case, be traversed in an hour, which would require a day by another. The same route may be liable to hourly obstructions and delays at one season, which would not be encoun-

Cincinnati R'y Co. v. Case, 122 Ind. 310. See, also, Philadelphia, etc. R. Co. v. Lehman, 56 Md. 209.

The first of two connecting carriers is liable for failure under a contract to deliver to the succeeding carrier within a given time or in time for a particular market. Fox v. Railroad Co., 148 Mass. 220; Pereira v. Railroad Co., 66 Cal. 92.

17. Black v. Baxendale, 1 Exch. 410; Hamlin v. Railroad Co., 1 H.

& N. 408; Bodley v. Reynolds, 8 Q. B. 779; Beckwith v. Frisbie, 32 Vt. 559; Railroad Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. Rep. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579; Railway Co. v. Josey, 6 Tex. Ct. Rep. 472, 71 S. W. Rep. 606.

18. Chicago, etc. R. Co. v. Chestnut Bros., — Ky. —, 89 S. W. Rep. 298.

19. Railroad Co. v. House, 101 Ill. App. 397.

tered at another. And at sea, the vessel may be delayed by adverse winds and tempests, upon one voyage, which she might not meet with upon the next. Different carriers upon the same route and between the same places may, according to their professions and course of business, be required to carry at different rates of speed and in different times; and even the same carrier, upon the same route and for the same distances, may undertake, according to his different modes of conveyance, to transport the goods within different periods of time. Different classes of goods may reasonably require greater expedition, depending upon the questions whether they are perishable or liable to freeze or to be affected by changes in the weather. All such circumstances and accidents are to be taken into consideration in deciding upon the question whether the carrier has been guilty of an unreasonable delay, and each case must be determined by its own facts.²⁰

Sec. 653. (§ 330.) How far carrier responsible for unavoidable delay.—But the reasons upon which the extraor-

20. *Mich. etc. R. R. Co. v. Day*, on Carr.; *Cantwell v. Express Co.*, 20 Ill. 375; *Broadwell v. Butler*, 6 58 Ark. 487, 25 S. W. Rep. 503. *McL.* 296; *Nudd v. Wells*, 11 Wis. 407; *Boner v. Steamboat Co.*, 1 Jones (N. C.), 211; *Parsons v. Hardy*, 14 Wend. 215; *Bennett v. Byram*, 38 Miss. 17; *Vicksburg, etc. R. R. v. Ragsdale*, 46 *id.* 458; *East Tenn. etc. R. R. v. Nelson*, 1 Cold. 272; *Hand v. Baynes*, 4 Whart. 204; *Wibert v. Railroad*, 2 Ker. 245; *Scovill v. Griffith*, *id.* 509; *Coffin v. Railroad*, 64 Barb. 379; *Gerhard v. Neese*, 36 Tex. 635; *Raphael v. Pickford*, 5 Man. & G. 551; *Hales v. The Railway*, 4 Best & Smith, 66; *Briddon v. The Railway*, 28 L. J., Exch. 51, 32 L. T. 94; *Hughes v. The Railway*, 14 Com. B. 637; *McGraw v. Railroad Co.*, 18 W. Va. 361; *Railway v. Coolidge*, — Ark. —, 83 S. W. Rep. 333, 67 L. R. A. 555, citing *Hutch.* on Carr.; *Cantwell v. Express Co.*, 58 Ark. 487, 25 S. W. Rep. 503. The question of what time is reasonable is one of fact for the jury. *Chinn v. Railway Co.*, 100 Mo. App. 576, 75 S. W. Rep. 375; *Bosley v. Railroad Co.*, 54 W. Va. 563, 46 S. E. Rep. 613, 66 L. R. A. 871. In the absence of a special agreement for carriage, delay caused by an unusual temporary influx of freight and the consequent inadequacy of the carrier's loading facilities is not actionable. *Bouker v. Railroad Co.*, 89 Hun, 202, 35 N. Y. Supp. 23. A railroad company receiving perishable property for transportation is bound to forward it immediately to its destination. *Railroad Co. v. Coolidge*, — Ark. —, 83 S. W. Rep. 333, 67 L. R. A. 555. If it

dinary responsibility of the common carrier for the safety of the goods is founded do not require that the same responsibility should be extended to the time occupied in their transportation. The danger of loss by robbery or embezzlement or theft, by collusion and fraud on his part, has no application when the mere time of the carriage is concerned. "His first duty," it is said, "is to carry the goods safely, and the second, to deliver them; and it would be very hard to oblige a carrier, in case of any obstruction, to risk the safety of the goods in order to prevent delay. His duty is to deliver the goods within a reasonable time, which is a term implied by the law in the contract to deliver; as Tindal, C. J., puts it, when he says, 'the duty to deliver within a reasonable time being merely a term engrafted by legal implication upon the promise or duty to deliver generally.'"²¹ In

has received the goods from a connecting carrier it will be liable if it detains them in the cars in which they were received until repairs ordered by its inspector are made, during which time the goods spoil. *Cartwright v. Railroad*, 85 Hun, 517, 33 N. Y. Supp. 147.

That goods shipped from New York on July 2nd had not been delivered down to July 10th in Denver does not show an unreasonable delay. *Brooks v. Railroad Co.*, 88 N. Y. Supp. 961

A carrier must transport live stock with reasonable dispatch, in view of the character of the shipment and its liability to injury from detention. *Sloop v. Railroad Co.*, — Mo. App. —, 84 S. W. Rep. 111; *Railway Co. v. Hunt* (Tex. Civ. App.), 81 S. W. Rep. 322.

Unreasonable delay caused by sidetracking cattle under the pretext of allowing other trains to pass will render the carrier liable. *Douglass v. Railroad Co.*, 53 Mo.

App. 473; *Railroad Co. v. Hobbs*, 14 Ky. L. Rep. 766.

A carrier receiving live stock from a connecting line is under no duty after receiving it to furnish immediate transportation. The law requires only reasonable diligence in its forwarding and transportation. *Railway Co. v. Kapp* (Tex. Civ. App.), 83 S. W. Rep. 233.

A mere showing by a plaintiff of a delay in the arrival of stock will not constitute negligence, since the delay may have been unavoidable, and hence not negligent. The burden of proof to show that the delay was due to negligence is on the plaintiff. *McCrary v. Railroad Co.*, 109 Mo. App. 567, 83 S. W. Rep. 82.

For delay in the shipment of hogs, see *Railroad Co. v. Lazarus*, 13 Ky. L. Rep. 461.

For delay in the shipment of lambs, see *Railroad Co. v. Smith*, 14 Ky. L. Rep. 814.

21. *Taylor v. Railway Co.*, L. R.

this respect, therefore, the common carrier stands upon the same ground with other bailees, and may excuse delay in the delivery of the goods by accident or misfortune, although not inevitable or produced by the act of God. All that can be required of him in such an emergency is, that he shall exercise due care and diligence to guard against the delay, and that if it occur without his fault or negligence, he shall omit no reasonable efforts to secure the safety of the goods.²²

Sec. 654. (§ 331.) Same subject—What will excuse delay.—Accordingly, it has been held that when the carrier's canal-boat was run into by a scow, which made it necessary for him to stop for repairs, the delay thereby occasioned was excusable;²³ or when he was delayed by deep snow, which made the road temporarily impassable;²⁴ or the washing away of a bridge over a

1 C. P. 385. Same point, see *Philadelphia, etc. R. R. Co. v. Lehman*, 56 Md. 209; *Express Co. v. Bratton*, 106 Ill. App. 563, citing *Hutch. on Carr.*; *Railway Co. v. Frankel Bros.*, 33 S. C. R. 115, 2 Canadian Ry. Cases, 155.

Unavoidable delay in the shipment of stock will not be negligence. *Railway v. Stone & Haslett*, — Tenn. —, 79 S. W. Rep. 1031.

22. But a common carrier is bound to provide engines of sufficient weight and power to overcome the effects of a heavy dew, and, if an unreasonable delay in the transportation of persons or property ensues from such an event as the fall of a heavy dew, it cannot shield itself from liability by the plea that its default was attributable to an act of God. A carrier must exercise enough diligence to overcome the effects of a dew falling upon its track, no matter how heavy the precipitation may be. It is only one of those

ordinary manifestations of the power of nature against the effects of which human foresight may and should provide. *Railway Co. v. Truskett*, 104 Fed. 728, 44 C. C. A. 179; *affirmed in* 186 U. S. 480, 46 L. Ed. 1259.

So if a carrier accepts enemies' goods without the knowledge and consent of the other shippers, it is a breach of duty towards them, and such a course is in effect to court detention, even though the carrier has a well-founded hope of being able to give such explanations to the authorities as will avoid the condemnation of the ship. For delay caused by such an act on the part of the carrier, and the consequent loss to other shippers, the carrier will be liable in damages. *Dunn v. Donald Currie & Co.*, (1902) 2 K. B. 614, 71 L. J. K. B. 963.

23. *Parsons v. Hardy*, 14 Wend. 215.

24. *Ballentine v. Railroad Co.*, 40 Mo. 491; *Briddon v. Railway*

stream which it was necessary for the carrier to cross, by a freshet;²⁵ or a low stage of water in a navigable river, which rendered it impossible for the carrier to proceed to the port of delivery;²⁶ or the freezing of a canal or river upon which the carrier is to transport the goods;²⁷ or a collision caused by the negligence of another railroad company.²⁸ So a railroad company will be excusable for delay in the delivery of goods when, having running powers upon another road, it is obstructed by the negligence of the latter;²⁹ or where, its road being in good order, and well equipped, it ran as many trains as could be run with safety, and the delay was caused by an unusual quantity of freight being delivered to it, which was being forwarded without preference, in the order of its receipt;³⁰ or where a part of a railroad company's track running into a city, which was the destination of the goods, had been destroyed by a fire, which also destroyed a large portion of the city itself, and caused an unprecedented press of business;³¹ or where atmospheric conditions rendered the telegraph wires by which the trains were directed in their movements unavailable, causing a

Co., 28 L. J. Exch. 51, 32 L. T. 94; *Palmer v. Railroad Co.*, 101 Cal. 187, 35 Pac. Rep. 630.

25. *Railroad Co. v. Ragsdale*, 46 Miss. 458.

26. *Bennett v. Byram*, 38 Miss. 17; *Silver v. Hale*, 2 Mo. App. 557.

27. *Bowman v. Teall*, 23 Wend. 306; *Beckwith v. Frisbie*, 32 Vt. 559; *Railway Co. v. Peale*, *Peacock & Kerr*, 135 Fed. 606,

But the carrier must justify his delay by proof of conditions which bring him within the protection of the rule invoked, and upon him rests the burden of establishing the sufficiency of his excuse. Thus a contract by the owner of a canal boat to carry goods shortly before the time that the canal may be expected to freeze requires him to make a special effort to perform

the contract, and if he does not use that diligence which is requisite under the circumstances, he will be liable in damages. *Spann v. Transportation Co.*, 11 Misc. 680, 33 N. Y. Supp. 566.

28. *Conger v. Railroad Co.*, 6 Duer, 375.

29. *Livingston v. Railroad Co.*, 5 Hun, 562; *Taylor v. Railroad Co.*, L. R. 1 C. P. 385.

30. *Wibert v. Railroad Co.*, 2 Ker. 245. Where the delay arose from an unusual press of business which could not reasonably have been anticipated, it was held that the carrier was not liable. *Mauldin v. Railway Co.*, — S. Car. —, 52 S. E. Rep. 677.

31. *Railroad Co. v. Burrows*, 33 Mich. 6.

delay in the shipment of freight;³² or where washouts were caused on its tracks by unprecedented floods.³³

Sec. 655. (§ 332.) Same subject—Other illustrations.—So where the carrier's line was to Philadelphia by rail, and thence to Boston by water, and, having carried the goods to the former place, but owing to obstructions in the river from ice it could not forward them for the time being by its own line, it was held that it was not required by its duty as carrier to send them on to destination by railroad, though that might have been done, especially as sending them in that way would have been very expensive. It was, therefore, held justified in detaining the goods until the obstruction should be removed. A carrier, it was said, is not bound to use any extraordinary exertions, nor to incur heavy expense, in order to hasten the carriage of the goods. All that can be required in that regard is reasonable diligence.³⁴ And where a vessel lying in port had taken on freight for another port, the usual route to which was through Long Island Sound, but the passage in that direction being obstructed by ice, the master took the open-sea route, and, encountering a storm, the goods were lost, it was held that he should have delayed his voyage until the obstruction was removed, the delay which would thereby have been occasioned having been a matter of mere secondary consideration to that of the safety of the goods; and the owners of the vessel were held liable for the value of the goods, because he had ventured to make the voyage by the more dangerous route, instead of delaying it until the customary and safer route became practicable. But, it was said, that if he had encountered the difficulty while *in transitu*, then a necessity would have been put upon him of exercising a sound discretion, and of adopting the course which prudence would have suggested.³⁵ So an embargo operates as a temporary restraint, which only suspends the time of the performance of

32. *Railway Co. v. Haynes*, 3 Miss. 46, 32 So. Rep. 912.
Tex. Civ. App. 20, 21 S. W. Rep. 622.

34. *Empire Trans. Co. v. Wallace*, 68 Penn. St. 302.

33. *Burnham v. Railway Co.*, 81

35. *Crosby v. Fitch*, 12 Conn. 410.

the contract of affreightment, and obliges the carrier to delay his voyage until its removal.³⁶

Sec. 656. (§ 333.) Same subject—Circumstances may make delay a duty.—Such occurrences may not only be relied upon by the carrier as an adequate defense against the charge of unreasonable delay, but they make delay on his part a positive duty. For if, in an attempt to hasten the carriage of the goods, he should expose them to danger, which by a temporary delay might have been avoided, and they should thereby be lost, he would be justly chargeable with negligence. In an emergency of this kind it is therefore incumbent upon him to exercise discretion. A reasonable degree of foresight is required of him in anticipating the difficulty, and skill and prudence in avoiding it when it is possible to do so; but when it has become unavoidable the duty is no less urgent to suspend his journey until the danger has passed. While it is his duty to convey the goods by the ordinary route and without unnecessary delay, both these duties may be obviated by the circumstances, and where either delay or deviation is necessary for the safety of the goods, it will be held to have been a part of the primary duty of the carrier.³⁷ And if, owing to some obstruction upon the route, the carrier is unable to forward the goods, he cannot, of his own accord, where the safety of the goods does not require it, undertake to send them forward over another route for the purpose merely of obviating a delay. His duty under such circumstances is to communicate with the shipper and obtain instructions as to their disposition, and for a failure to do so, he will be liable for such damages as result from his wrongful act.³⁹

Sec. 657. (§ 334.) Same subject—Delay from strikes or riots.—But while circumstances which can be referred neither to the act of God nor of the public enemy, even though they

36. *Hadley v. Clarke*, 8 T. R. See, also, *International, etc., Ry. Co. v. Wentworth*, 8 Tex. Civ. App. 259; *McBride v. Ins. Co.*, 5 Johns. 299; *Palmer v. Lorillard*, 16 id. 348. 5, 27 S. W. Rep. 680.

38. *Fisher v. Railroad Co.*, 99

37. *Crosby v. Fitch*, 12 Conn. Me. 338, 59 Atl. Rep. 532, 105 Am. 410; *Davis v. Garrett*, 6 Bing. 716. St. Rep. 283, 68 L. R. A. 390.

may be produced by the negligence or the fault of third persons, may excuse delay in the carriage of the goods, no such excuse will avail the carrier if the delay has been occasioned by the agency of himself or his servants. Where a railroad company was sued for delay in the carriage of goods, the defense set up was the refusal of a large number of the defendant's engineers to work on account of their dissatisfaction with a new regulation of the company.³⁹ "The position," said the court, "that the defendants are not responsible, because the misconduct of their servants was wilful and not negligent, cannot be sustained. The action is not brought on account of any injury done to the property by the engineers, but for an alleged non-performance of a duty which the defendants owed to the owner of the property. If their inability to perform was occasioned by the default of persons for whose conduct they are responsible, they must answer for the consequences without regard to the motives of those persons. In the common case of a contract for services, as for building a house, which the builder had been unable to perform because his workmen had abandoned his service, proof that their conduct was wilful and every way unjustifiable would not give the party injured an action against them, nor would it excuse the party who had made the contract. A similar point was taken in *Weed v. The Panama Railroad Company*,⁴⁰ where misconduct of the defendants' servants in detaining a train of cars was active, but it was held not to furnish any answer for the detention. . . . In the present case the excuse arises wholly out of the misconduct of the defendants' servants who wrongfully refused to perform their duty, and thus deprived the defendants, for the time, of the ability to send forward the property; and the question is, whether the defendants' case can be separated from that of the engineers, so that it can be held that though the latter were culpable, their employers, the defendants, were without fault and consequently

39. *Blackstock v. Railroad Co.*, 40. 17 N. Y. 362.
20 N. Y. 48, 75 Am. Dec. 372.

not responsible to the plaintiff. . . . The maxim in such cases is *respondet superior*."⁴¹

While this is true, however, yet where former employees have "struck," have repudiated their contract of service, severed their relation as servants and assumed toward their former employer an attitude of active hostility, they can no longer be regarded as servants within this rule, and if the carrier has other servants ready and willing to perform who are prevented from doing so by the "strikers," the carrier will not be responsible for a delay thereby occasioned though the "strike" was planned while the "strikers" were on duty.⁴²

So the fact that the carrier has recently reduced the wages of his employees will not justify or excuse a mob, composed of indiscriminate persons, in delaying the goods nor render the carrier liable for such delay.⁴³

Neither is the carrier liable, if not himself in fault, for delays caused by rioters.⁴⁴

Sec. 658. (§ 335.) Carrier must complete carriage when cause of delay rumored.—Obstructions and accidents, how-

41. Story on Agency, § 308; a mob or strike might be a sufficient defense, it would seem that it ought to be made to appear that the mob or strike existed without the fault of the defendant, and the facts should be stated so that the court may determine from them whether the mob or strike was such as occasioned an unavoidable delay." Railroad v. Bell, 13 Ky. L. Rep. 393.

42. Geismer v. Railroad Co., 102 N. Y. 563, 55 Am. Rep. 847; Haas v. Railroad Co., 81 Ga. 792; Railroad Co. v. Georgia Fruit & Vegetable Exchange, 91 Ga. 389, 17 S. E. Rep. 904; Railroad Co. v. Tisdale, 74 Tex. 8, 11 S. W. Rep. 900; Railroad Co. v. Hollowell, 65 Ind. 188; Railway Co. v. Bennett, 89 Ind. 457; Railway Co. v. Johnson (Tex. Civ. App.), 15 S. W. Rep. 121; Little v. Fargo, 43 Hun, 233; Bartlett v. Railway Co., 94 Ind. 281.

43. Pittsburgh, etc. R. Co. v. Hollowell, 65 Ind. 188; Lake Shore, etc. R'y Co. v. Bennett, 89 Ind. 457.

44. Gulf, etc. R'y Co. v. Levi, 76 Tex. 337, 13 S. W. Rep. 191 (overruling 12 S. W. Rep. 677); Bartlett v. Railway Co., 94 Ind. 281.

"Though the delay occasioned by

ever, which will excuse delay in the carriage of the goods, do not put an end to the contract to carry. The utmost indulgence the carrier can claim from them is delay beyond what would otherwise have been a reasonable time for their carriage and delivery to the consignee. As soon as the impediment to their transportation is removed, he must proceed with them, and complete the performance of his contract without further delay. In the meantime, he must exercise care and diligence in taking care of the goods, and may, if it should be necessary for their preservation, unload and store them.⁴⁵

The burden of proof is on the carrier to show that he exercised due care to transport the goods within a reasonable time after the impediment was removed, and the question as to what was a reasonable time is for the jury.⁴⁶

Sec. 659. (§ 336.) Same subject.—A remarkable instance of the application of this law to the case of the carrier is furnished by the case of *Hadley v. Clarke*.⁴⁷ A vessel had taken a cargo on board, under a contract to deliver at a foreign port. Before she sailed for the port of destination, an embargo was laid upon all ships bound to that port, in consequence of which she was obliged to suspend her voyage. She retained the cargo on board for two years, and the embargo not having been taken off, she then unloaded it. Two months afterwards the embargo was removed, and the owner of the cargo sued the carrier for a breach of contract in not carrying the goods. The court of king's bench, at the head of which was Lord Kenyon, held that both parties were innocent, and that whatever their decision might be, one of them must suffer; and that neither being in fault, the case must be determined upon strict principles of law.

⁴⁵. *Bowman v. Teall*, 23 Wend. 476, 21 L. R. A. 117, 34 Am. St. 306; *Vicksburg, etc. R. R. v. Ragsdale*, 46 Miss. 458; *Bennett v. Byram*, 38 id. 17; *Lowe v. Moss*, 12 Ill. 477; *Evans v. Hutton*, 5 Scott N. R. 670; *Spann v. Transportation Co.*, 33 N. Y. Supp. 566, 11 Misc. 680; *Railroad Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. Rep.

476, 21 L. R. A. 117, 34 Am. St. Rep. 579; *Railroad Co. v. Lewis* (Tex. Civ. App.), 23 S. W. Rep. 323, citing *Hutch. on Carr. (live stock)*.

⁴⁶. *Burnham v. Railroad Co.*, 81 Miss. 46, 32 So. Rep. 912.

⁴⁷. 8 T. R. 259.

The embargo, it was admitted, was a legal interruption of the voyage, but it was held that it was only a suspension of the contract, and that when that suspension ceased the liability to perform was revived, and that the defendant, having engaged to convey, the dangers of the seas only excepted, he could set up no other excuse.

Sec. 660. (§ 337.) Power of the owner of the goods to change their destination—Liability for freight.—So long as the goods remain the property of the bailor, he may countermand any directions he may have given as to their consignment, and may at any time during the transit require of the carrier their redelivery to himself; and if such redelivery can be made without too much inconvenience or expense to the carrier, he will be bound to make it. “A carrier is employed as bailee of a person’s goods for the purpose of obeying his directions respecting them, and the owner is entitled to receive them back at any period of the journey when they can be got at. To say that a carrier is bound to deliver goods according to the owner’s first directions is a proposition wholly unsupported either by law or common sense. I can well understand the case of goods being placed in such a position that they cannot easily be got at, though it is usually otherwise.”⁴⁸ But if the goods are demanded by the owner during the transit, when the carrier is willing and able to fulfill the contract on his part, the latter will be entitled to his full freight for the whole distance to the destination to

48. Per Martin, B., in *Scothorn v. Railway Co.*, 8 Exch. 341; *Mich. etc. R. R. v. Day*, 20 Ill. 375; *Steidl v. Railroad*, — Minn. —, 102 N. W. Rep. 701, citing *Hutch. on Carr.*; *Sharp v. Clark*, 13 Utah, 510, 45 Pac. Rep. 566, citing *Hutch. on Carr.*

The owner of goods being transported by a common carrier has the right to have his consignment, while in transit, diverted at any intermediate point through which it passes; but such right of diversion cannot add to the burdens of the carrier, or require it to do more than comply with a proper and legal demand therefor; and the carrier will not be obliged to heed such a demand unless some evidence of the right of the party making it is furnished before the goods reach the stopping point from which a diversion is sought. *Ryan v. Railway Co.*, 90 Minn. 12, 95 N. W. Rep. 758, citing *Hutch. on Carr.*

which they were originally directed, and any expense he may be put to in unloading.⁴⁹ If this be tendered, and he refuse to restore the goods, it will amount to a conversion. The owner cannot, however, it is said, change the destination and require delivery somewhere else, except upon the basis of a new contract, after the carrier has completed his undertaking and carried the goods to the destination first agreed upon.⁵⁰

Sec. 661. (§ 337a.) Right of owner to terminate carriage short of destination.—So clearly the owner would have the right, while no new interests have intervened and subject to the carrier's claim for full freight,⁵¹ to intercept the goods upon their journey and demand their delivery at any reasonable point upon the carrier's line short of the original destination. *A fortiori* is this so, where, through no fault of the owner, the carriage is delayed by accident or the fault of the carrier.⁵²

49. See *post*, § 801. *Violet v. Stettinius*, 5 Cranch C. Ct. 559; *Shipton v. Thornton*, 9 Ad. & El. 314; *Thomson v. Small*, 1 Com. B. 328; *Carr v. Railroad Co.*, 92 N. Y. Supp. 799.

Where a carrier delivers goods to the person to whom they were consigned, even though that person was formerly the shipper's agent, after notice from the shipper not to do so except on his written order, the carrier will be guilty of conversion and it will be no defense to an action for such conversion that such person had a lien on the goods for freight paid, where it appears that at that time he owed the shipper a larger sum. *Lester v. Railroad Co.*, 92 Hun, 342, 36 N. Y. Supp. 907.

But the carrier is not guilty of a conversion if he delivers to the consignee, notwithstanding the order of the consignor to redeliver to him, if at the time of delivery there is still in force between the

consignor and consignee a contract by which the consignee agrees to sell the goods and account to the consignor at a certain price, the title to the goods to remain in the consignor until paid for. *Lester v. Railroad*, *supra*.

50. *Melbourne v. Railroad Co.*, 88 Ala. 443.

51. As to this, see *ante*, § 660, and *post*, § 801.

52. In *Straus v. The Martha*, 35 Fed. Rep. 313, a steamship, disabled on the way, was detained at Halifax for repairs from October to February. The consignee of glycerine on board of her, hearing of her probable detention, demanded delivery of the glycerine at Halifax, offering to pay full freight, together with all incidental expenses, and to sign a general average bond. This was refused, and on the arrival of the cargo finally in New York the glycerine was found to be damaged. The vessel was held liable.

But in the absence of a stipulation in the shipping contract expressly providing for the payment of freight for the entire distance, the carrier may be estopped from demanding full freight to the point of original destination by proof of a usage or custom followed by him of making delivery to shippers at intermediate stations upon their paying freight to such points. Such a usage is not contrary to law, and when it has become so general and well settled that the shipper and carrier will be presumed to have contracted with reference to it, the carrier, when the goods are demanded at an intermediate point, will be entitled only to the freight earned in transporting the goods to such point.⁵³

53. *Sharp v. Clark*, 13 Utah, 510, 45 Pac. Rep. 566.

CHAPTER IX.

OF DELIVERY BY THE CARRIER.

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Sec. 662. (§ 338.) Last duty of carrier is delivery.—The last duty required of the common carrier is that of delivery. This duty the law imposes upon him as soon as he accepts the goods, and whether so expressed or not, it becomes a part of his contract. From that moment he becomes not only responsible for their safety against all accidents, except such as are attributable to the act of God or the public enemy, and not excepted in his contract, but he becomes, also, responsible for their proper delivery, and until this is made, his extraordinary liability continues.¹ It therefore becomes important to ascertain how the law requires this delivery to be made, and what

1. *Cavallaro v. Railway Co.*, 110 St. Rep. 94, citing *Hutch. on Carr. Cal.* 348, 42 Pac. Rep. 918, 52 Am.

is necessary to constitute such a delivery as will put an end to this liability. No word has the same invariable meaning when used in different connections, and the meaning of delivery, when used in the common affairs of life, does not always determine its meaning when used as a legal term; and even when thus used, what we are to understand by it frequently varies according to the particular subject or relation to which it is applied. So the delivery required of the common carrier has, by usage and legal construction, come to have very different significations, according to the particular kind of business which he undertakes, and the various modes of conveyance which he employs in its transaction; and that which constitutes a delivery in one case, or as to one kind of carrier, will not be considered as sufficient for the purpose when performed by another, the particular nature of whose employment as carrier, or whose mode of carriage may be different. In this regard the usages of the various kinds of carriers have conformed to the necessities of commerce, and the law, in its turn, seems to have been made to conform to such usages.²

Sec. 663. (§ 339.) Same subject.—The law upon the subject of delivery by carriers to each other, where there are connecting lines, and it becomes necessary that one should transfer the goods to the other next succeeding, for further transportation, has already been treated.³ It was thought that the subject of delivery as between such carriers would be more appropriately discussed in that connection, as upon it turns the question, so frequently of vital importance to such connecting lines, as to what is necessary to shift the liability for the safety of the goods from one to another. And as this can only be done by a delivery, it became pertinent then to inquire what, as between them, was necessary to constitute such delivery. Occasion was also then taken to give the law and authorities upon the subject of what is known as constructive delivery, as the question when and under what circumstances delivery, which

2. *Wilson v. Railroad Co.*, 94 Cal. 166, 29 Pac. Rep. 861, 17 L. R. A. 685.

3. *Ante*, § 129, *et seq.*

was not actual or its equivalent, would be considered as sufficient to change the responsibility for the goods, is of more frequent occurrence between connecting lines of carriers than between the bailor and the carrier. Much of what has been there already stated would not be inappropriate under the head of this chapter. The rule that the carrier is required to carry and deliver the goods within a reasonable time and the excuses which he is allowed to make for delay have been also treated of in the next preceding chapter in relation to his duties in respect to the carriage. Referring to what is there said as belonging also appropriately to the subject of this chapter, it is now proposed to treat of the duty of the carrier in respect to the delivery of the goods when they have reached their destination.

I. OF DELIVERY IN GENERAL.

Sec. 664. (§ 340.) How made in general.—It may be stated, generally, that every delivery must be made to the right person, at a reasonable time, at the proper place, and in a proper manner. These are all requisites of a valid delivery, except in so far as a compliance with them may be waived by the party entitled to the goods. If tendered to the proper person at an unreasonable time, at an improper place or in an improper manner, he may still accept the goods, and by so doing he of course waives all objections which he might have urged against their acceptance under the circumstances, and acquits the carrier of all further liability.⁴ But if he refuse to re-

4. *Jewell v. Railroad*, 55 N. H. 58 Barb. 195; *Railway Co. v. 84; Lewis v. Railroad*, 11 Met. 509; *Hoyt*, 37 Ill. App. 64; *Anchor Mill Sweet v. Barney*, 23 N. Y. 335; *Co. v. Railroad Co.*, 102 Iowa, 262, 71 N. W. Rep. 255, citing *Hutch. on Carr.*; *Railway Co. v. A. B. Frank & Co.* (Tex. Civ. App.), 48 S. W. Rep. 210, citing *Hutch. on Carr.*; *Normile v. Railway Co.*, 36 Wash. 21, 77 Pac. Rep. 1087, citing *Hutch. on Carr.*
Cleveland, etc., Railroad v. Sargent, 19 Ohio St. 438; *Bartlett v. S. B. Philadelphia*, 32 Mo. 256; *Propeller Mohawk*, 8 Wall. 153; *Hill v. Humphreys*, 5 Watts & S. 123; *Richardson v. Goddard*, 23 How. 28; *Haslam v. Express Co.*, 6 Bosw. 235; *Goodwin v. Railroad*,

ceive them, for any of these reasons, and it should turn out that the carrier was in fault, such tender will not relieve him from his responsibility for the safety of the goods.⁵ Questions of time, place and manner, as well as of the person to whom delivery should be made, are therefore of frequent importance in deciding whether an attempted performance of his duty to deliver has relieved the carrier of his onerous charge.

Sec. 665. (§ 341.) Duty to make personal delivery except where changed by usage.—Formerly, it was understood to be the duty of all common carriers to deliver the goods to the consignee personally, except in the case of goods brought by ships from foreign countries. In such cases, it was established by custom that the duty of the carrier only required him to carry from port to port, and that there was no obligation upon him to make a personal delivery to the consignee. But as to other carriers, it was held that, *prima facie*, it was their duty to make delivery directly to the person entitled thereto, at his residence or place of business.⁶ But it was always admitted that it was competent for the carrier to show that the uniform usage and course of the business in which he was engaged authorized a delivery in a different manner, and if he could show such a usage, of long continuance, uniformity and notoriety, he would be discharged, if he had delivered in accordance with it.⁷

Sec. 666. (§ 342.) Same subject.—The manner in which, however, the various classes of common carriers are required

5. *Eagle v. White*, 6 Whart. 505; 389; *Bartlett v. S. B. Philadelphia, Hill v. Humphreys*, 5 Watts & S. 32 Mo. 256; *Hemphill v. Chenie*, 6 123; *Railway Co. v. Trammel*, 28 Watts & S. 62; *Schroeder v. Railroad*, 5 Duer, 55; *Fisk v. Newton*, 716, citing *Hutch. on Carr.* 1 Denio, 45.

6. *Gibson v. Culver*, 17 Wend. 305; *Eagle v. White*, 6 Whart. 505; *Duff v. Brod. & B.* 177; *Birket v. Willan*, 2 Barn. & Ald. 356; *Storr v. Crowley*, 1 McClel. & Y. 129; *Hyde v. T. & M. Nav. Co.*, 5 T. R. 7. *F. & M. Bank v. Cham. Trans. Co.*, 23 Vt. 186; *Huston v. Peters*, 1 Met. (Ky.) 558; *Broadwell v. Butler*, 6 McLean, 296; *Van Santvoord v. St. John*, 6 Hill, 157; *Loveland v. Burke*, 120 Mass. 139.

to make delivery has now become so well settled that a case could but seldom occur in which it could not be at once determined without a resort to the proof of usage or custom. Not only have the usages of those who ply the business of carrying goods for hire for the public in the various modes and according to their various professions become universally understood, but as to those into whose hands the great bulk of the carrying business of the country has fallen, most of the questions of doubt as to the manner in which they are required to make the delivery of the goods to the consignee or party entitled to them have been settled by judicial decision; and whenever such questions now arise, judicial notice will generally be taken of their several modes of delivery, as matters of law rather than of fact, as to usage. It is still, however, the duty of most of those who are classed as common carriers to make personal delivery to those for whom the article carried is intended; and whenever the carrier engaged in a particular mode of carrying, as to which the kind and manner of delivery required have not been so established, claims that he is exonerated by the long existing and uniform course of his business from making a personal delivery, the presumption of law will be against his claim and he must overcome it by proof. Delivery to the person for whom the goods are intended, or to whom they are consigned, being the rule, he must bring himself within the exception by showing a long continued and well understood usage.

Sec. 667. (§ 343.) Same subject—How delivery made—Degree of diligence required.—Whenever a delivery to the consignee in person is required to be made by the carrier, it is his duty to seek him, and make him a tender of the goods.⁸ If the goods are directed or marked for a particular house or number,

8. *Schroeder v. The Railroad*, 5 Duer, 55.

"A mere change in name on a way-bill or receipt given by a careless clerk while goods are in transit from carrier to carrier has never, so far as we are advised,

been held alone sufficient to relieve the last carrier from the obligation to use all reasonable efforts to deliver goods to the real consignees at the proper destination." *Pennsylvania Co. v. Railway Co.*, 107 Ill. App. 386.

they must be carried there to be tendered, and if the consignee is not found there, and is unknown to the carrier, he must use reasonable diligence in his efforts to find him. What is due and reasonable diligence in such cases will, of course, depend very much upon the circumstances of each case, and is a question of fact for the jury, and not of law for the court. What would be sufficient in one place might be entirely insufficient in another, and the extent and character of the inquiries to be made, in the exercise of reasonable diligence, cannot be regulated or prescribed by any fixed standard. The degree of diligence must be that which a prudent business man would be expected to use about an important business affair of his own.⁹ When a package was addressed to Martin Witbeck, and the agent of the carrier, not knowing any such person, looked into the city directory, and not being able to find the name there, inquired of several persons who informed him that they knew of no such man, whereupon he addressed a notice of the arrival of the package through the postoffice to Martin Witbeck, and put the package in the office safe, which several weeks afterwards was broken open by burglars and the package was taken from it and lost, the carrier was held liable because he had not used proper diligence to find the consignee.¹⁰

Sec. 668. (§ 344.) Excuses for non-delivery—Neither fraud, imposition nor mistake will excuse delivery to wrong person.—No circumstances of fraud, imposition or mistake will excuse the common carrier from responsibility for a delivery to the wrong person.¹¹ The law exacts of him absolute certainty that the person to whom the delivery is made is the party right-

9. *Witbeck v. Holland*, 45 N. Y. App. 641; *Cavallaro v. Railway Co.*, 110 Cal. 348, 42 Pac. Rep. 918, 52 Am. St. Rep. 94, citing *Hutchinson on Carr.*; *Southern, etc., R'y Co. v. Webb*, — Ala. —, 39

10. *Witbeck v. Holland*, 45 N. Y. 13; s. c. 55 Barb. 1443.

11. *Express Co. v. Shearer*, 160 Ill. 215, 43 N. E. Rep. 816, 52 Am. St. Rep. 324, 37 L. R. A. 177, citing *Hutchinson on Carr.*; s. c. 43 Ill. 718, citing *Hutchinson on Carr.*

fully entitled to the goods, and puts upon him the entire risk of mistakes in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind; and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed or consigned. If, therefore, the person who applies for the goods is not known to the carrier, and he has any doubt as to his being the consignee, he should require the most unquestionable proof of his identity; or, if from any cause he should have a reasonable doubt as to whether the person claiming the goods was entitled to them, he should refuse delivery to him until he established his right.¹² In such cases the carrier will be protected in his qualified refusal, if he have a reasonable excuse therefor, until the proper evidence is furnished that the party claiming is the party entitled. But he must act in good faith, and solely with a view to a proper delivery; and the question whether his excuse was reasonable under the circumstances, and of his good faith, is one for the jury.¹³ And if such refusal be qualified, and it be found to have been in good faith, and because of a reasonable doubt as to the right of the claimant, it will not be treated as a conversion.¹⁴ If,

12. *Sellers v. Railway Co.*, 123 Ga. 386, 51 S. E. Rep. 398, citing *R'y Co. v. Freeman* (Tex. Civ. App.), 16 S. W. Rep. 109. Hutchinson on Carr.

13. *McEntee v. N. J. Steamboat Co.*, 45 N. Y. 34; *Rogers v. Weir*, 34 *id.* 463; *Alexander v. Southey*, 5 B. & Ald. 247; *Ball v. Liney*, 48 N. Y. 6; *Merz v. Railway Co.*, 86 Minn. 33, 90 N. W. Rep. 7; *Lester v. Railroad Co.*, 92 Hun, 342, 36 N. Y. Supp. 907; *Moore v. Railroad Co.*, 103 Va. 189, 48 S. E. Rep. 887, citing Hutchinson on Carr.

The carrier is not liable for refusing to deliver to an unidentified consignee who fails to produce the bill of lading, even though he may offer to give security. Gulf, etc.

The fact that a railroad asks that its "notice of arrival" be presented by the consignee does not protect the railroad if the notice of arrival be lost by the consignee or his agents and the railroad delivers the goods to a third person on its production. *Sinsheimer v. Railroad Co.*, 46 N. Y. Supp. 887, 21 Misc. 45.

14. *Sargent v. Gile*, 8 N. H. 325; *Leighton v. Shapley*, *id.* 359; *Dent v. Chiles*, 5 Stew. & P. 383; *Watt v. Potter*, 2 Mason, 77; *Baltimore, etc. R. Co. v. Pumphrey*, 59 Md. 390.

however, the delivery be made to the wrong person, whether by an innocent mistake or through fraud practiced upon the carrier, such wrongful delivery will be a conversion.¹⁵

Sec. 669. (§ 345.) Responsibility for delivery to the wrong person—Negligent delivery to person not the consignee.—Cases are abundant in which the carrier has been made the sufferer by a delivery to the person not entitled to the goods, and in which his attempts to excuse such wrongful delivery have been unavailing. In *Price v. The Railroad Company*,¹⁶ the

15. *Hawkins v. Hoffman*, 6 Hill, 586; *Powell v. Myers*, 26 Wend. 591; *Devereux v. Barclay*, 2 B. & Ald. 702; *Duff v. Budd*, 3 Brod. & B. 177; *Nebenzahl v. Fargo*, 3 N. Y. Suppl. 929; *Reynolds v. Railroad Co.*, 3 N. Y. Suppl. 331; *Forbes v. Railroad Co.*, 133 Mass. 154; *Houston, etc. R'y Co. v. Adams*, 49 Tex. 748; *McCulloch v. McDonald*, 91 Ind. 240; *St. Louis, etc. R. Co. v. Larned*, 103 Ill. 293; *Little Rock, etc. R'y Co. v. Glidewell*, 39 Ark. 487. But see *Ryder v. Railroad Co.*, 51 Iowa, 460; *Railroad Co. v. Barkhouse*, 100 Ala. 543, 13 So. Rep. 534, citing *Hutch. on Carr.*; *Bruhl v. Coleman*, 113 Ga. 1102, 39 S. E. Rep. 481; *Railway Co. v. Wright*, 25 Ind. App. 525, 58 N. E. Rep. 559; *Railway Co. v. Fifth National Bank*, 26 Ind. App. 600, 59 N. E. Rep. 43; *Railway Co. v. Johnston*, 45 Neb. 57, 63 N. W. Rep. 144, 50 Am. St. Rep. 540, citing *Hutch. on Carr.*; *Security Trust Co. v. Express Co.*, 80 N. Y. Supp. 830, 81 App. Div. 426; *affirmed* in 178 N. Y. 620, 70 N. E. Rep. 1109, citing *Hutch. on Carr.*

It is no defense that the carrier offered to the consignee other goods of equal value. *Clement v. Railroad Co.*, 56 Hun, 643, 9 N. Y. Supp. 601.

But where the goods were sent subject to the order of the consignor to notify the consignee for the purpose of inspection, and the carrier placed the car containing the goods upon a switch at the consignee's warehouse for the purpose of allowing him to inspect the goods, the carrier retaining control of the car, it was held that a removal of a portion of the goods by the consignee did not constitute a conversion. *Conrad Schoop Fruit Co. v. Railroad Co.*, — Mo. App. —, 91 S. W. Rep. 402.

16. 50 N. Y. 213.

In *Guillaume v. Transportation Co.*, 100 N. Y. 491, it appeared that defendant was a carrier between Havre and New York. One S., who resided in Gourin, France, acting in pursuance of a previous correspondence as to rates, etc., sent to Havre a bag of gold directed to defendant's agent at Havre with instructions "to forward to Mr. Frank Guillaume, 152 and 154 Bleckert street, New York, Utica, America." The gold was duly received by the agent at Havre, who, two days before the steamer sailed, sent to S., at Gourin, a letter inclosing a bill of lading which stated that the gold was to be transported to New York and de-

facts as found were, that a person, with the intention of swindling the plaintiff, addressed to him a letter in the name of a fictitious firm, requesting him to send the goods to the address of the firm. Plaintiff, supposing the order to be hon-

livered "to M. Guillaume Frank, 152 and 154 Bleckert street, New York." This bill of lading contained a clause to the effect that the shipper, by accepting it, assented to its conditions. It took two days for letters to go from Havre to Gourin. S. sent no reply to the letter and took no steps to notify defendant of the erroneous statement in the bill of lading. After the arrival of the vessel in New York defendant attempted to notify the owner by sending a bill of lading directed to Guillaume Frank, 152 and 154 Bleckert street, New York. The bill of lading fell into the hands of a swindler, who, by representing himself to be Guillaume Frank, obtained the money. In an action to charge defendant with the loss it was held that the bill of lading did not, under the circumstances, constitute the contract between the parties; that the retention of the bill of lading by S. did not show an assent to the mistake, and, at most, the question of his negligence was one of fact; that defendant was bound to deliver the gold according to the directions, and that the question whether defendant was not guilty of negligence in sending the bill of lading to one not entitled to it, by means of which he obtained the gold, was, at least, one of fact, and the finding on this point being against the defendant, the court refused to disturb it.

In *Sword v. Young*, 89 Tenn. 126,

14 S. W. Rep. 481, affirmed on rehearing, 14 S. W. Rep. 604, one Gillenwaters, over the assumed and fictitious name of Charles G. Magrauder, wrote from Knoxville, Tenn., to Cleveland, Ohio, ordering a brick machine. On its arrival Gillenwaters presented a bill of lading in the name of Charles G. Magrauder, paid the freight and demanded and received the machine, receipting for it in the name of Magrauder. No questions were asked, nor was he required to identify himself, nor was the bill of lading indorsed. The carrier was held liable. "It can make no difference," said the court, "that the defendant carrier thought because Gillenwaters had the bill of lading that he was Charles G. Magrauder. If he was a stranger, as the proof shows him to be, it was the duty of the carrier to have required him to identify himself as the consignee or his rightfully constituted agent. By its failure Gillenwaters was enabled to practice that fraud intended to be guarded against by the rule from Kent (2 Kent's Com. 9th ed. 805), as well as a theft or, its equivalent, the obtaining of the goods by false pretenses. That Gillenwaters had succeeded in deceiving the complainants by representing himself as Magrauder is no excuse to the defendant for its failure to use an effort to discover his true character. The consignment was to Charles G. Magrauder. That

est, although he did not know any such firm, shipped the goods by the defendant's road, consigned as directed in the order. There was in fact no such firm as that in whose name the goods had been ordered, and the letter written in its name was a part of a scheme to defraud the plaintiff of the goods. When the goods arrived at destination, a stranger to the defendants' agent called at their office there, paid the freight on the goods, and was permitted to take them away. The defendants' agent knew of no such firm as that signed to the letter ordering the goods, and to which they were consigned, and delivered the goods without requiring any evidence of the person claiming them as to his identity, or of his connection with such a firm. It was also found as a matter of fact, that the person to whom the delivery was made was the same person who had written the forged letter to the plaintiff ordering the goods, and that his evident purpose was to obtain the goods by falsely assuming to be the party to whom they were, by his direction, consigned; in which scheme he succeeded. The plaintiff, having thus lost the goods, sued the carrier as for a conversion of them. The court from which the appeal had been taken had held the carrier to be excusable under these circumstances, the very person having obtained the goods who had ordered them, although he had done so in a false name, for the purpose of defrauding the plaintiff.¹⁷ But this judgment was reversed, and it was said that the common carrier must, at his peril, deliver property to the true owner; for if delivery be made to the wrong person, either by an innocent mistake or through the fraud of another, he will be held responsible, and the wrongful delivery will constitute a conversion. It was the duty of the defendants' agent to make

name was fixed on the machine, and it was a duty to deliver to him only, or, if he could not be discovered, to notify the consignor. There is no difference between this case and one in which a consignment has been made to an actual person and the goods are

delivered by accident, mistake or carelessness to a cheat who represents himself as the real consignee. It is necessary in both to have proof of identity or authority to receive."

17. 58 Barb. 599.

inquiry as to the existence of such a firm as that to which the goods were consigned, and, upon its being ascertained that there was no such firm, and that a delivery could not therefore be made, he should have warehoused the goods for the owner; instead of which he delivered them to a stranger, without making any inquiry as to who or what he was. If the delivery had been made to another person than the real swindler, under the like circumstances, the defendants would have been clearly liable. The question, therefore, was, whether the person who wrote the order acquired a right, so far as the defendants were concerned, to a delivery of the goods; in other words, whether, as to the carrier, he was the consignee. If he was, then a delivery to him discharged the carrier, upon the principle that any delivery, valid as to the consignee, is a defense for the carrier as to all persons. But it was said that the plaintiff did not intend that the goods should be delivered to the writer of the order, but to the firm to which they were directed, and that the former was not the consignee. The delivery was therefore made to one who was neither the consignee nor the owner of the goods, and the defendants were held liable for their value.

Sec. 670. (§ 346.) Same subject.—The same conclusion was reached by the supreme court of Vermont in the case of Winslow against the Vermont, etc., Railroad,¹⁸ in which the facts were the same, except as to names and dates. The goods were delivered by the agent of the defendant to the swindler, who had procured the sending of the goods by the same kind of device, without requiring from him any evidence of his being the person to whom the goods were addressed, and without taking any precaution to ascertain whether he was the proper person to receive them. The carrier was held liable for their value on the ground of negligence. “What,” say the court, “should be the effect upon the measure of the defendants’ responsibility of plaintiff’s error in directing the goods to a fictitious address? This might be an important question, if the error had misled the defendants and occasioned them to deliver

the goods to the wrong party, after they had used that care and precaution which would be reasonable in such matters. But this error in the direction could not excuse the defendants from the exercise of at least ordinary care in the delivery of the property. They did exercise no such care. They were guilty of actual-negligence. They delivered the goods to an employee of a truckman, upon his mere statement that Roberts sent for them. Any other man in Boston could have obtained them just as easily. The swindler, Collins, was not known as Roberts, and, if he had been required to identify himself as Roberts, might never have attempted it; and if he had, it would have been likely to lead to the detection of the fraud.

Sec. 671. (§ 347.) Same subject.—So in *The American Express Company v. Fletcher*,¹⁹ the facts were, that a person claiming to be J. O. Riley applied at the office of a telegraph company to have a message sent, signed J. O. Riley, requesting a remittance of a considerable sum of money to his address. The message was accordingly sent, and the money forwarded by an express company as carrier, as requested, and received by the agent of the company at the place from which the message had been sent, who was also the operator for the telegraph company who had sent the dispatch, and was paid over by the agent to the person who had sent the message, but who turned out to be a swindler. It was held that the express company was liable for negligence in delivering the money without further proof of his being the party entitled to it than the mere fact that he had sent the dispatch, in re-

19. 25 Ind. 492. See, also, *Southern Exp. Co. v. Van Meter*, 17 Fla. 783. In *Houston, etc. R'y Co. v. Adams*, 49 Tex. 748, one Russell Adams had shipped goods by defendant's line, to himself at town of B. in name of R. Adams. After their arrival at B. one Robert Adams wrote to defendant from another town, in name of R.

Adams, to forward these goods to latter town, which was done, and the goods were there delivered to the swindler without production of bill of lading or receipt. The swindler was a single man of no means and a comparative stranger at the place of delivery. *Held*, the company was liable.

sponse to which the money had been received. The case is silent as to whether there was a real J. O. Riley, but we are to assume that there was; otherwise, the money would not have been sent to that address. It must have been intended for a real J. O. Riley, and delivered to one who assumed that name for the purpose of fraud.

And in the same court in a subsequent case, *American Express Company v. Stack*,²⁰ the carrier was held liable under still more exculpating circumstances. A person knowing, as it seems, by some means that there were goods in the possession of the wife of one James Stack, who was absent from her, which by falsely personating her husband he might induce her to forward to his address, telegraphed to her in the name of her husband to send them to his address. Being completely deceived she sent the goods by the express company as carrier as directed, at the same time writing a letter addressed to James Stack at the same place to which the goods had been forwarded, informing him that they had been sent according to his directions. This letter came to the hands of the swindler as he had arranged that it should do. He then demanded the goods of the company, showing this letter and describing the goods, which were contained in a package, as proof that he was the genuine James Stack. The delivery of the goods was however refused, and he was required to adduce further evidence of his identity with the real James Stack for whom the goods were intended. This he did by a person known to the agent of the company, who stated the man's name to be James Stack, as he really thought it was. Without further inquiry the agent delivered the goods. It turned out that this man was not the real James Stack to whom the goods had been sent. The delivery under such circumstances was held to have been inexcusable negligence.

Sec. 672. (§ 348a.) Same subject—Liability of carrier for innocent delivery to consignee though a swindler.—But to be distinguished from these cases, according to some, although not all of the authorities, are those in which the carrier, acting

in good faith and with due diligence, delivers the goods to the person to whom they were consigned, though the consignor may have supposed the consignee to be another person or have been induced by fraud to direct the delivery of goods to such consignee. In such cases the carrier is held not to be liable.²¹ The leading case upon this question is *Samuel v. Cheney*,²² decided by the supreme judicial court of Massachusetts. In that case a swindler, assuming the name of A. Swannick, sent a letter to the plaintiff asking for a price list of cigars, and giving his address as "A. Swannick, P. O. box 1595, Saratoga Springs, N. Y." The plaintiff replied, addressing his letter according to this direction. The swindler then sent another letter ordering a quantity of cigars. These plaintiff shipped by the defendant, and at the same time sent a letter to the swindler addressed as above notifying him of the shipment. There was at this time in Saratoga Springs a reputable dealer of the name of Arthur Swannick, who did business as "A. Swannick" at the corner of Ash and Franklin streets, and who was in good standing and reported as solvent by a commercial agency to which plaintiff applied for information. No other A. Swannick appeared in the Saratoga directory or was known to the commercial agency. But about this time a man appeared at Saratoga, rented a store at 16 Congress street, hired box 1595 in the postoffice, and used printed letter-heads with his name printed as "A. Swannick, P. O. box 1595." This man wrote the letters to plaintiff and received the replies. He soon after disappeared. Plaintiff supposed the letters were written by, and that he was dealing with, Arthur Swannick. He sent the goods directed "A. Swannick, Saratoga Springs, N. Y." Defendant carried the packages safely to Saratoga Springs. Shortly before their arrival defendant had received another package of cigars directed to A. Swannick, which he offered to Arthur Swannick,

21. *Samuel v. Cheney*, 135 Mass. 278; *Edmunds v. Transportation Co.*, 135 Mass. 283; *McKean v. McIvor*, L. R. 6 Exch. 36; *Dunbar v. Railroad Co.*, 110 Mass. 26; *Bush v. Railway Co.*, 3 Mo. Ap. 62; *The Drew*, 15 Fed. Rep. 826.

22. 135 Mass. 278.

who refused them, saying he had ordered no cigars. Afterwards on the arrival of the packages in question, defendant took them to the store at 16 Congress street, and delivered them to the person in possession, who receipted for them in the name of "A. Swannick." The swindler's real name was assumed, in the case, not to be A. Swannick.

An action being brought to charge defendant with the loss of the goods, Morton, C. J., after passing the question whether, under the circumstances, the property in the goods passed to the swindler so that a *bona fide* purchaser could hold them as against the plaintiff, said: "The contract of the carrier is not that he will ascertain who is the owner of the goods and deliver them to him, but that he will deliver the goods according to the directions. If a man sells goods to A., and by mistake directs them to B., the carrier's duty is performed if he delivers them to B., although the unexpressed intention of the forwarder was that they should be delivered to A.

"If, at the time of this transaction, the man who was in correspondence with the plaintiff had been the only man in Saratoga Springs known as, or who called himself, A. Swannick, it cannot be doubted that it would have been the defendant's duty to deliver the goods to him according to the direction, although he was an imposter, who by fraud induced the plaintiff to send the goods to him.²³ The fact that there were two

23. Citing *Dunbar v. Railroad Co.*, 110 Mass. 26. In this case the swindler had bought the goods in person, under an assumed and fictitious name, and had directed them to be sent to the address of the assumed name. When the goods arrived at destination, no person of that name being known to the agent of the road, they were warehoused, and so remained for some two weeks, when the real party came for them, professing to act as the agent of the person to whose address they had been sent. They were delivered to him, and he signed a receipt in his true name, being known to the agent. It was held that, under these circumstances, the carrier was not liable as for a misdelivery, the very person having obtained the goods who had fraudulently purchased them and for whom they were intended. The seller and consignor of the goods had sold them to the fraudulent buyer in person. He therefore knew to whom he was selling them, though he did not know him by his correct name; and the very person to whom he sold them had received them from

bearing the name made it the duty of the defendant to ascertain which of the two was the one to whom the plaintiff sent the goods.²⁴ . . .

“The plaintiff contends that he intended to send the goods to Arthur Swannick. It is equally true that he intended to send them to the person with whom he was in correspondence. We think the more correct statement is that he intended to send them to the man who ordered and agreed to pay for them, supposing erroneously that he was Arthur Swannick. It seems to us that the defendant, in answer to the plaintiff’s claim, may well say, we have delivered the goods intrusted to us according to your directions, to the man to whom you sent them, and who, as we are induced to believe by your acts in dealing with him, was the man to whom you intended to send them; we are guilty of no fault or negligence.”²⁵ The cases of *Winslow v.*

the carrier. Another distinguishing feature in this case was, that at the time of the delivery, the carrier was holding the goods, not as carrier but as warehouseman, and was responsible only as an ordinary bailee. This distinction was not adverted to in the opinion of the court, the decision being put squarely upon the ground that the goods had been delivered to the person to whom they had been sold and for whom they were intended. But, as we shall hereafter see, it is one of great importance in determining the question of the liability of the carrier for a wrong delivery.

24. The court here proceed to say: “Suppose, upon the arrival of the goods in Saratoga Springs the impostor had appeared and claimed them; to the demand of the defendant upon him to show that he was the man to whom they were sent, he replies, ‘True, there is another A. Swannick here, but he has nothing to do with this

matter; I am the one who ordered and purchased the goods; here is the bill of the goods, and here is the letter notifying me of their consignment to me, addressed to me at my P. O. box 1595.’ The defendant would be justified in delivering the goods to him, whether he was the owner or not, because he had ascertained that he was the person to whom the plaintiff had sent them. It is true the defendant did not make these inquiries in detail; but if, by a rapid judgment, often necessary in carrying on a large business, he became correctly satisfied that the man to whom he made the delivery was the man to whom the plaintiff sent the goods, his rights and liabilities are the same as if he had pursued the inquiry more minutely.”

25. The court refer to the case of *McKean v. McIvor*, L. R. 6 Exch. 36. The facts were the same as those in the New York and Vermont cases, except that the goods

Railroad, *American Express Co. v. Fletcher and Price v. Railway*, cited in the foregoing sections, say the court, "differ widely in their facts from the case at bar and are distinguishable from it."

The application of the rule in the case of *Samuel v. Cheney* has, however, been qualified even by those courts which recognize that case as enunciating a correct principle of law, and it has been held that, "if there be negligence in the delivery, resulting in the goods being turned over to one who represents a person well known at the place of delivery, the carrier will be liable."²⁶

were addressed to the fictitious firm at a given number upon a certain street, to which a notice of the arrival of the goods was sent by the carrier, addressed to the firm, which coming to the hands of the swindler, he indorsed the name of the fictitious firm upon it and thus obtained the goods. The carrier was exonerated from liability.

See, also, *Clough v. Railroad Co.*, L. R. 7 Exch. 26.

In the case of *Wilson v. Express Co.*, 27 Mo. App. 360, the court say: "If two men of the same name live in the same town, and one of them orders goods from a merchant at a distance, and the carrier delivers to the man of that name who had really made the order, is such carrier to be held responsible simply because the consignor thought his order was from the other of the two men? No case has gone to this extreme. The carrier is responsible for a correct delivery, but he is not the guardian of his patrons, nor, when faultless himself, must he answer for their mistakes or mend their misfortunes." But in this case on the second trial (43 Mo. App. 659)

the jury, under proper instructions from the court, found in favor of the plaintiff, and the appellate court refused to disturb their verdict.

See, also, the case of *The Norwalk Bank v. The Adams Express Company*, 4 Blatchford, 455.

26. *Pacific Express Co. v. Critzer* (Tex. Civ. App.), 42 S. W. Rep. 1017; *Express Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 42 S. W. Rep. 795.

In *Railroad Co. v. Fort Wayne Electric Co.*, 108 Ky. 113, 55 S. W. Rep. 918, the plaintiff shipped goods to A. B. Camp & Co. It appeared that another had wrongfully ordered the goods in the name of A. B. Camp & Co. When the goods arrived at destination, A. B. Camp & Co. informed the carrier that they had not ordered the goods and the carrier thereupon delivered them to the person who had wrongfully ordered them in A. B. Camp & Co.'s name. It was held that the carrier was liable to the plaintiff consignor for their value.

In *Oskamp v. Express Co.*, 61 Ohio St. 341, 56 N. E. Rep. 13, one Rothschild induced the plaintiff,

Sec. 673. Same subject—The contrary view.—But in the case of *The Express Co. v. Shearer*,²⁷ the Supreme Court of Illinois declared that the rule in *Samuel v. Cheney* was incorrect, and they declined to follow it. The facts in that case were as follows: W. W. Shearer & Co. of Chicago had dealings with one J. C. Stubblefield, who was engaged in buying stock in Kansas, Missouri and Texas, and who from time to time applied to Shearer & Co. for advances of money, which they sent him in the form of drafts, letters of credit, and money by express. In April, 1888, J. C. Stubblefield was at Chetopa, Kansas, and telegraphed Shearer & Co. for \$700, and it was sent to him in a draft, and he was there identified at the bank, and received the money for the draft. In April, 1889, J. C. Stubblefield again arrived in Chetopa, Kansas, but did not register at his hotel, and left town on the following day. By the same train that he came on, another man came to Chetopa, calling himself J. C. Stubblefield. This second one, who may be designated as the impostor, went to another hotel than that to which the real J. C. Stubblefield went. On April 22, 1889, the impostor exchanged several telegrams with Shearer & Co. in the name of J. C. Stubblefield, including one to express him \$4,000. He thereupon gave orders to the railroad company to hold eleven stock cars as if he were going to make heavy shipments of stock. On the 24th he appeared at the office of the express company and asked if there was a package for J. C. Stubblefield. The agent handed him the package on the impostor producing the telegrams received by him from Shearer & Co., identifying the amount of money in the package, and on the representation of the impostor's landlord that he had the stock cars ordered for his stock. After receiving the pack-

by false personation, to ship a package of diamonds consigned to one T. M. Jones, rated as a reputable merchant in Hopkinsville, Ky. Jones, secured possession of the package. The express company was held liable for its value as for a conversion.

Rothschild then presented himself at the office of the express company in Hopkinsville, Ky., and, by representing that he was T. M. Jones, secured possession of the package. The express company was held liable for its value as for a conversion.

27. 160 Ill. 215, 43 N. E. Rep. 816, 37 L. R. A. 177, 52 Am. St. Rep. 324, affirming, 43 Ill. App. 641.

age, the impostor left town and was not seen again in Chetopa. The imposition was discovered when the real J. C. Stubblefield returned to Chicago. Under this state of facts the express company was held liable, the Supreme Court of Illinois saying that the strict liability of the common carrier to safely deliver to the proper person should in all proper cases be rigidly enforced and in no way lessened.

Sec. 674. (§ 349.) Same subject—Delivery on forged order or to unauthorized agent no excuse.—So it has often been held that if the carrier deliver to a wrong person, claiming the goods under a forged order, he will be liable for the value of the goods if they are thereby lost to the owner.²⁸ Or if he deliver the goods to the wrong party by mistake;²⁹ or to a person

28. *Gosling v. Higgins*, 1 Camp. 451; *Lubbock v. Inglis*, 1 Stark. 104; *Powell v. Myers*, 26 Wend. 591; *Hawkins v. Hoffman*, 6 Hill, 586; *American Mer. Ex. Co. v. Milk*, 73 Ill. 224; *Southern Ex. Co. v. Van Meter*, 17 Fla. 783.

29. *Devereux v. Barclay*, 2 B. & Ald. 702; *Guillaume v. Packet Co.*, 42 N. Y. 212. In *Viner v. The Steamship Company*, 50 N. Y. 23, the action was brought against the defendant, as common carrier, for the conversion of a quantity of butter shipped by plaintiffs at New York to Georgetown. The defense was that the butter had been delivered to one Smith, a consignee of plaintiffs, under a letter which it was claimed gave him the apparent right to receive it. The butter was shipped without receipt or bill of lading, there being only an entry on the manifest of the vessel of eleven packages of butter, marked S. in a diamond, shipped by F. Viner & Co., the plaintiffs, "to order." The butter was delivered to Smith by the delivery clerk of the defendants, at

Georgetown, on the faith of a letter written to him from plaintiff's agent, which contained the following clause: "*The roll sent you to day you will find of good quality,*" etc. This letter was of the same date as the shipment of the butter, and the clerk supposed it had reference to the butter which he had received, and so delivered it to Smith. This he was thought to have been justified in doing under the circumstances by the judge at the circuit, but upon appeal it was held otherwise. "I cannot agree," said Church, C. J., "with the learned judge who tried this cause at the circuit, that the letter from the plaintiffs to Smith was, as a question of law, sufficient authority for the defendant to justify a delivery of the butter to him. The property was shipped to Georgetown, consigned to plaintiffs' order, and not marked with the name of any person. The carrier had no right to deliver it except upon the order of the plaintiffs. It is well settled that a delivery to a wrong person is a con-

not authorized to receive them, though they be delivered to him for the consignee or owner, the carrier believing him at the time to be the agent of such consignee or owner, it being held that the carrier must know at his peril that the person to

version. The letter claimed as authority was written to Smith, and not to the defendant. It does not purport to be an order for the delivery of the property; it does not state that any butter was sent to Smith, nor in any manner authorize him to receive it. It refers to butter sent, but not to him; nor does it specify the quantity or the number of packages, or the line or agency which transported it, and it was not marked with his name. Assuming that the letter refers to the same butter, which it probably did, the most liberal inference which could be drawn from it was that the plaintiffs intended that Smith would have an opportunity of seeing it, or selling it, or, at most, intimating that the plaintiffs might thereafter give him an order for it; but it is an unwarrantable stretch of construction that it authorized the carriers to deliver it to him. . . . The defendant acted in good faith, doubtless; but to permit carriers to deliver property expressly consigned to the order of the consignor upon an authority to be spelled out of language not addressed to them, and so uncertain and ambiguous, would encourage laxity and negligence, and lead to great injustice to the owners of property, and would be contrary to law and sound business principles. Common carriers cannot thus easily relieve themselves from responsibility. Their liability continues

until the property is delivered according to the consignor's order, and it is no answer for a wrong delivery to say that it was done by mistake, and with no bad intent. The consignor required a delivery to his own order; the delivery was made without such order, and consequently at the risk of the carrier. If the defendant had refused to deliver the butter, and Smith had brought an action to recover it upon the authority of this letter, no court would have tolerated the action for a moment. It was not, therefore, their duty to have delivered it upon this authority, and the most favorable disposition of the case for the defendant would have been to submit the question to the jury upon the letter and all the other facts of the case, to determine whether from the plaintiffs' negligence or otherwise the defendant was excused or justified in delivering the property as it did. . . . It is urged that the plaintiffs' negligence in writing such a letter caused the delivery and produced the injury. The writing of the letter was not negligence *per se*. The undisputed existence of a fact sometimes constitutes negligence in law; but when inferences are to be drawn, or it depends upon circumstances, it is a question of fact to be determined by a jury." The *Ben Adams*, 2 Ben. 445; *Collins v. Burns*, 63 N. Y. 1.

whom he makes such delivery has authority to receive the goods.³⁰

But to justify delivery to an agent no further or other proof of the fact of the agency is required than is necessary in other cases.³¹ The fact, however, that the consignee does not reside at place of destination and does not expect to be there to receive the goods will not justify a delivery to a general agent of the consignor resident there.³²

Sec. 675. (§ 349a.) Same subject—How where consigned to agent of carrier.—The effect of consigning the goods to the agent of the carrier at the place of destination has been somewhat considered by the courts. Where the goods are consigned to the consignee, in care of such an agent, or where the agent of the carrier can otherwise be deemed to be the agent of the consignee, a delivery to the agent of the carrier for the consignee seems to be a good delivery and to exonerate the carrier from his liability as such.³³

Where, however, the property was consigned directly to the agent of the carrier, an express company, who knew who the owner and consignee was, but was not authorized to receive it for him, it was held that the company was not exonerated as carrier by delivery to such agent, but that it continued liable until it had made a personal delivery to the consignee or until after reasonable efforts had been made to find and notify him of its arrival.³⁴

30. *Angle v. Railroad*, 18 Iowa 555; *Willard v. Bridge*, 4 Barb. 361; *Claffin v. Railroad*, 7 Allen, 341; *Schlesinger & Sons v. Railroad Co.*, 85 N. Y. Supp. 372; *Sonn v. Smith*, 68 N. Y. Supp. 217, 57 App. Div. 372.

31. *Wilcox v. Railroad Co.*, 24 Minn. 269; *Wright, etc., Co. v. Warren*, 177 Mass. 283, 58 N. E. Rep. 1082; *Railroad Co. v. Rothschild & Co.*, 119 Ga. 604, 46 S. E. Rep. 830.

Where an expressman found a note on the consignee's door direct-

ing that articles for the consignee should be delivered to the janitress, and he delivered the goods to the janitress, according to the direction, he was not liable for their subsequent loss by theft from the janitress. *Ruffin v. Ruggerio*, 31 N. Y. Supp. 826, 10 Misc. Rep. 739.

32. *Wilson Sewing Machine Co. v. Railroad Co.*, 71 Mo. 203.

33. *Bennett v. Express Co.*, 12 Oreg. 49.

34. *Bennett v. Express Co.*, 12 Oreg. 49.

But where the consignee and owner was not known, it was held that the duty of the carrier was to transport the goods to their destination and there to hold them safely until called for by the owner and delivered to him; that as to the first duty, that of carriage to destination, they were liable as carriers, but as to the latter, they were liable simply as warehousemen.³⁵

Sec. 676. Same subject—How where consigned to consignee in care of another person.—Goods shipped to one person as consignee in care of another should be delivered to the consignee, and, in case he can not be found, then to the one in whose care they are shipped.³⁶ Nor is the right of the consignee to the goods changed by the goods being shipped "in care of" another person, and by that other person refusing to receive them, if the carrier knows, in fact, who the real party in interest is. When it clearly appears that the carrier refuses to deliver the goods shipped to the owner and real party in interest, with a knowledge of the fact that the party claiming the goods is the identical person to whom they are addressed and consigned, the right of the owner to the possession is removed from the possibility of doubt. If the carrier persists in his refusal to deliver, the owner may maintain replevin.³⁷

Sec. 677. (§ 349b.) Same subject—How where goods are misdirected.—The carrier cannot be held liable for losses caused, without his negligence, by the misdirection of the goods.³⁸ But if notwithstanding the misdirection, he knows

35. *Alabama, etc. R. Co. v. Kidd, Short, etc. R. Co. v. Hodapp*, 33 Ala. 209. See, also, *Mobile, etc. R'y Co. v. Prewitt*, 46 Ala. 63, commented upon in *Bennett v. Express Co.*, *supra*. Penn. St. 22.

36. *Schlesinger v. Railroad Co.*, 88 Ill. App. 273.

37. *Express Co. v. Hammer*, 21 Ind. App. 186, 51 N. E. Rep. 953.

38. *Southern Ex. Co. v. Kaufman*, 12 Heisk. 161; *Erie R'y Co. v. Wilcox*, 84 Ill. 239; *Stimson v. Jackson*, 58 N. H. 138; *Congar v. Railroad Co.*, 24 Wis. 157; *Lake*

Where by mistake a shipper of goods directed them to the consignee at Philadelphia, N. Y., instead of Philadelphia, Pa., and they were carried by the railroad company to the point designated and held for several months without any one calling for them, the carrier was held not liable for their loss by fire while at such point, in the absence of proof that the fire was due to its failure to

the true direction,³⁹ or if, by the use of ordinary diligence, he could ascertain the true direction,⁴⁰ he will not be excused for a misdelivery. Where, at the time the goods are tendered to him for carriage, the carrier knows that they are misdirected, as where they are directed to a place which does not exist, he should not accept them, but await correct directions; and if he does accept the goods and sends them forward he will be liable for their loss.⁴¹

It may happen that the addresses on a package and that given in the receipt of the carrier are different. The question then arises whether the address given in the receipt is conclusive on the rights of the parties. If the address on the package has been correctly printed by the shipper, and a mistake made in the receipt by the carrier, it would be manifestly unjust to allow the carrier to escape liability for non-delivery by showing that the consignee could not be found at the address appearing in the receipt. But if the address has been incorrectly printed on the package by the shipper, and the

exercise ordinary care; and its liability in such respect was not altered by the fact that the agent at the point of shipment, when notified of the error, agreed to forward them to Philadelphia, Pa., since there was no consideration for his undertaking, and at most it amounted to only a gratuitous agency on the carrier's part. *Trelven v. Railroad Co.*, 89 Wis. 598, 62 N. W. Rep. 536.

So where two or more consignments of goods are sent at the same time by the same shipper under separate bills of lading, any loss arising from misdelivery through the shipper's neglect to sufficiently mark his goods falls on the shipper and not on the carrier. *Feldstein v. Steamboat Co.*, 46 N. Y. Supp. 897, 21 Misc. 60.

Where the misdirection is due to

the carrier's own negligence, he will be liable for any loss occurring in consequence thereof. *Railroad Co. v. Neimann*, 84 Ill. App. 272.

But as a succeeding carrier never sees the bill of lading till it is surrendered, and a delivery of the goods made, the waybill is a complete defense to it for delivery at a wrong destination. *Hayman v. Railroad Co.*, 86 N. Y. Supp. 728, 43 Misc. 74.

39. *Mahon v. Blake*, 125 Mass. 477.

40. *Guillaume v. Transportation Co.*, 100 N. Y. 491.

41. *O'Rourke v. Railroad Co.*, 44 Iowa, 526. Carrier is not liable where, while waiting correct directions, the goods are destroyed by accidental fire. *Erie R'y Co. v. Wilcox*, 84 Ill. 239.

correct address is given in the receipt by the carrier, in an action against the carrier for failure to deliver it is error not to admit evidence that the address on the package was incorrect and that the carrier had made an effort to deliver at that address. However cogent as evidence the receipt may be as to the actual address which the package bore, it is nevertheless not conclusive, and other evidence is admissible to show the address upon the package.⁴²

Sec. 678. (§ 349c.) Same subject—Carrier not liable where wrong delivery induced or ratified by owner.—Obviously the carrier cannot be liable, though he has delivered the goods to a person not entitled to them, if such delivery was caused or induced by the owner of the goods.⁴³ And so a wrongful delivery may be ratified by the owner, thereby relieving the carrier from liability therefor.⁴⁴

42. *Cappel v. Weir*, 92 N. Y. Supp. 365; s. c. 90 N. Y. Supp. 394.

43. *Dobbin v. Railroad Co.*, 56 Mich. 522; *Brasher v. Railway Co.*, 12 Colo. 384; *Schwarzschild & Sulsberger Co. v. Railway Co.*, 76 Mo. App. 623; *Carroll v. Express Co.*, 37 S. C. 452, 16 S. E. Rep. 128.

In *Wernwag v. Railroad Co.*, 117 Penn. St. 46, plaintiffs' agent had taken an order for goods from L. B. which he sent to plaintiffs. Not knowing L. B., and supposing it to be intended for A. B., whom they knew, they sent the goods to A. B. by defendant's road. A. B. had, however, gone out of business. L. B. claimed the goods. Defendant inquired of plaintiffs' agent whether he had sold goods to L. B., and was told he had. Defendant delivered to L. B., who was insolvent, and defendant was held liable for delivery to L. B., who was not the consignee. The inquiry of the agent did not disclose that he had sold these goods to L. B., and nothing in the conduct of the consignors justified a delivery to other than the consignee.

In *Conley v. Railway Co.*, (Can.) 32 Ont. R. 258; *affirmed* 1 Ont. L. R. 345, plaintiffs shipped goods to "The International Chemical Company" which was not incorporated. They did not intend that the carrier should deliver the goods until the company was incorporated. The carrier delivered the goods in the usual course of business under that name. The court held that the carrier was not liable for the consequent loss as the shippers knew the company was not incorporated when the goods were shipped.

44. *Dobbin v. Railroad Co.*, 56 Mich. 522; *Reynolds v. Railroad Co.*, 3 N. Y. Suppl. 331; *Converse v. Railroad Co.*, 58 N. H. 521;

Sec. 679. (§ 350.) Same subject—Doctrine of the cases stated.—It will thus be seen that no possible circumstances of fraud, imposition or mistake, causing the delivery to the wrong person, which have not been induced by the conduct of the owner of the goods, or in which he has not participated, will, at least according to the American cases upon the subject, excuse the carrier from liability for the value of the goods if they are thereby lost, and that when the owner of the goods has been made the dupe of an artifice which has induced him to pursue a course in reference to them which has led to the delivery by the carrier to an improper person who was not really entitled to them, the carrier will nevertheless be responsible for the loss thereby occasioned, where he has been guilty of negligence, but in some jurisdictions not where, in good faith, he has delivered to the person to whom the owner actually directed the goods, although the owner may have been misled.

Sec. 680. When delivery at wrong place is deemed a conversion.—Delivery of the goods at the wrong place and failure to notify the shipper of the wrong delivery will sometimes be deemed a conversion of the goods. Thus where specific directions were written in the shipping receipt to ship to Gates City, Va., and the carrier afterwards without the shipper's knowledge billed the goods to Preston, Va., where they were allowed to lie and become valueless, the carrier was held liable for a conversion. In order that the shipper may be charged with notice that shipment has been made to the wrong place,

Cleveland, etc. R. Co. v. Sargent, (Dissenting opinion by McLean, J.)
19 Ohio St. 438.

In *Hayman v. Railway Co.*, 86 N. Y. Supp. 728, 43 Misc. 74, a consignee, being notified of the delivery of goods by the carrier at a wrong place, notified the carrier to forward them to another place and received them there. It was held that such acceptance operated as a waiver of the carrier's liability for the misdelivery.

The fact that the owner receives payment from the person to whom the wrongful delivery is made for a portion of the goods does not constitute a waiver of his claim against the carrier for the balance if he does not intend such waiver. *Lester v. Railroad Co.*, 92 Hun, 342, 36 N. Y. Supp. 907.

actual notice, or facts from which such notice could reasonably be inferred, must be shown.⁴⁵

Sec. 681. (§ 351.) Delivery by carrier holding as warehouseman subject to less stringent rules.—But an important distinction is here to be noticed between the circumstances which will support an action against the carrier when, holding the goods in that relation, he makes a wrong delivery of them, and when, having become a mere warehouseman or bailee of the goods, he delivers them to a person not entitled to them, being induced to do so by fraud or imposition or the fault of the sender or consignee. In the former case, as we have seen, such a delivery is *per se* and under all circumstances a conversion of the goods, and he becomes at once liable for their value in an action of trover. But when the carrier has made such reasonable efforts to find the consignee as the law requires of him, and has failed to do so, or if he has tendered the goods to the consignee and he has refused them, or if from any other cause his relation to the goods as carrier has ceased, and he has become responsible for their safety merely in the character of warehouseman or ordinary bailee, this rigid rule of law becomes inapplicable. Such are the cases of *Stephenson v. Hart*,⁴⁶ and *Duff v. Budd*,⁴⁷ which are sometimes cited to show that, as a rule of law, the carrier who has made a delivery of the goods to a person not entitled to them and not authorized to receive them is, under any circumstances, guilty of a conversion of them, and liable for their value to the true owner. In the former of these cases the plaintiff was imposed upon by a swindler, and consigned a box by his direction to J. West,

45. *Railway Co. v. Potts & Co.*, 33 Ind. App. 564, 71 N. E. Rep. 685.

46. 4 Bing. 476

47. 3 Brod. & Bing. 177.

In *Oderkirk v. Fargo*, 61 Hun, 418, 16 N. Y. Supp. 220; *s. c.* 58 Hun, 347, 11 N. Y. Supp. 871, the agent of an express company agreed to allow the consignee, before he had paid the charges, to

take part of the goods and leave the balance to be called for at a future day. He negligently later delivered the balance to some unknown persons who called for them without authority from the consignee. The carrier was held liable for negligence, although it was merely acting as a warehouseman.

Great Winchester street, London. The carrier found that no such person resided there, and so took away the box to be kept for the consignor; but about a week or ten days afterwards, he received a letter signed J. West, informing him that the box had been addressed to him by mistake to Great Winchester street, and requesting that it be forwarded to him at another place. The box was sent accordingly and was received by the swindler, who soon afterwards disappeared. The goods having been obtained from the plaintiff by fraud, and having been delivered to a person not entitled to them, it was held that the action of trover would lie, and that it was a question for the jury whether the defendant had been guilty of such negligence as to entitle the plaintiff to a recovery, Burrough, J., saying: "I am of opinion that the verdict is right, that there is no ground for a new trial, and that the action is maintainable on the second count of this declaration. At the outset, no doubt, the contract was between the carrier and the consignee; but when it was discovered that no such person as the consignee was to be found in Great Winchester street, that contract was at an end, and the goods remaining in the hands of the carrier as the goods of the consignor, a new implied contract arose between the carrier and the consignor, to take care of the goods for the use of the consignor. It is clear that the property in them never passed out of the plaintiff, the consignor. The whole transaction was a gross fraud; the goods procured by a bill with a false drawer and false acceptor, and no such person as the consignee ever heard of at the place to which he had addressed the goods. That circumstance ought to have awakened the suspicions of the defendants, and they were guilty of gross negligence in parting with them without further inquiry. In the result, they have the goods of the plaintiff in their possession, and they are liable to him if they deliver them wrongfully." Gaselee, J., however, was of opinion that the defendants were not liable to an action of trover, as having been guilty of a wrongful conversion of the goods. "For delivery to a wrong person," said he, "a carrier is no doubt responsible in trover; but from all

that appears in this case, it may be collected that the person who received the box was the person calling himself West and the person to whom it was intended the box should be delivered."

Sec. 682. (§ 352.) Same subject.—In *Duff v. Budd* the plaintiffs had received an order from a person unknown to them to furnish goods for Mr. J. Parker, of High street, Oxford. The plaintiffs, never having dealt with Parker, made inquiry about him, and finding that Mr. Parker, of High street, Oxford, was a tradesman of great respectability, forwarded the goods by the defendant's wagon, directing the parcel to "Mr. James Parker, High street, Oxford." The carrier's porter knew Mr. William Parker, of High street, Oxford, to whom he had before delivered goods, and on the morning after their arrival informed him of the fact. He said he expected no such parcel, and knew nothing about it. Shortly afterwards, a person to whom the carrier's porter had before delivered goods under the name of Parker, called at the carrier's office, and, seeing the parcel, said that it was his; and he was allowed to take it away without any evidence that he was the person for whom it was intended. The man having turned out to be an impostor, and the goods having been lost to the plaintiffs, they sued the carrier in case; and the jury having found a verdict for them, the court refused to disturb it, the case having been properly left to the jury upon the facts, and they having found that it was a case of negligence.¹

1. In *Bush v. Railroad Co.*, 3 Mo. App. 62, it appeared that plaintiffs, who were wholesale dealers in St. Louis, received a letter from St. Charles, Mo., signed "Henry Hund," and ordering certain wine and whisky. They did not know any such person, but, on consulting Bradstreet's report, they found that there was at St. Charles a saloon-keeper in good credit named Henry Hund, and they thereupon shipped the goods by defendant's road, addressed to "Henry Hund, St. Charles, Missouri," and at the same time sent by mail to the same address a duplicate copy of the bill of lading and a bill of the goods. The bill of lading contained a condition that if the goods were not removed in twenty-four hours defendant should thereafter be liable only as a warehouseman. There were at this time in St. Charles two per-

Sec. 683. (§ 353.) Same subject.—This subject was discussed in the case of *Heugh v. The Railway Company*.² In this case the goods had likewise been procured from the plaintiffs by a fraudulent letter written in the name of a company which had ceased to do business, by a person who had formerly been in its employment. The goods were sent according to instructions, directed to a particular number and street. The carrier tendered the goods there, but they were refused, and thereupon, according to the course of his business, he sent an advice note to the company at the place designated for the delivery of the goods. Several days afterwards the person who had forged the order for the goods appeared at the carrier's office with another forged order, signed with the company's name, directing the delivery of the goods to him. This order was obeyed, and the goods delivered accordingly. It was held that, when the carrier had tendered the goods at the appointed

sons each calling himself Henry Hund,—one the reputable saloon-keeper referred to and a stranger who had been there less than two weeks, but had rented a store in that name and made some arrangements for fitting it up. The goods in question, with others addressed in the same way, arrived in St. Charles in due time, and defendant's agent notified the well known saloon-keeper, who refused to receive the goods, saying he had not ordered them. After remaining at the depot twenty-four hours, the goods were sent, according to custom, to the warehouse. About four days later the stranger appeared and claimed the goods. Defendant's agent at first refused to deliver to him, saying they did not know him, though he had heard that such a man had recently arrived in St. Charles, and was about to open a store there. The stranger insisted that the goods were his and produced

the bill of lading and surrendered it to defendant's agent, who thereupon took his receipt for the goods and delivered them to him. He soon after disappeared, proving to be a swindler.

In an action to charge defendant with the value of the goods, it was held that there was no misdelivery; that the goods were (1) delivered to the person to whom they were directed, and (2) that defendant as a warehouseman had been guilty of no negligence.

See also, *Wilson v. Express Co.*, 27 Mo. App. 360; *s. c.* 43 Mo. App. 659; *Oskamp v. Express Co.*, 61 Ohio St. 341, 56 N. E. Rep. 13; *Railroad Co. v. Fort Wayne Electric Co.*, 108 Ky. 113, 55 S. W. Rep. 918; *Pacific Express Co. v. Critzer* (Tex. Civ. App.) 42 S. W. Rep. 1017; *Express Co. v. Hertzberg*, 17 Tex. Civ. App. 100, 42 S. W. Rep. 795.

2. L. R. 5 Exch. 50.

place, and had sent the advice note according to the usual course of his business, he ceased to hold the goods as carrier. That being the case, the question was whether, under the circumstances, the delivery amounted in law to a conversion, or whether the carrier was only bound to act, and did act, with reasonable caution. The cases of *Stephenson v. Hart* and *Duff v. Budd* were urged upon the court as sustaining the proposition that, under the proof in the cause, the carrier was, as a matter of law, guilty of a conversion; but this was denied to be the result of these cases. "The plaintiffs contend," said Kelly, C. B., "that this was a misdelivery on the part of the defendants, amounting to a conversion; but no sufficient authority has been cited in support of this position. It is true that a misdelivery by a carrier has been held to amount to a conversion; but the defendants' character of carriers had ceased, and whatever character they filled it was not that. Their position has been not inaptly described as that of involuntary bailees. Without their own default they found these goods in their hands, under circumstances in which the character of carriers, under which they received them, had ceased. Did they then, as involuntary bailees, become subject to an absolute duty to deliver to the proper person, so as to be liable for misdelivery, though without negligence? The only authorities in the courts of this country cited in support of that proposition are *Stephenson v. Hart* and *Duff v. Budd*; but in neither case was it held or even contended that the misdelivery amounted as a matter of law to a conversion; but in both cases it was admitted to be a question for the jury, and the question was, in fact, left to them whether, under all the circumstances, the defendants had acted with reasonable care. It is plain then, on the authority of those cases, that misdelivery under such circumstances is not as a matter of law a conversion, but that it is a question of fact for a jury whether the defendants have exercised reasonable and proper care and caution. The jury have answered this question in favor of the defendants, and they are therefore entitled to keep their verdict."

Sec. 684. (§ 354.) Same subject—The rule stated.—The law upon this subject may, therefore, be stated to be that, so long as the carrier continues in the relation of carrier to the goods, he is under an absolute engagement that they shall be delivered only to the person to whom they were consigned; but that when, from any cause, he ceases to hold them as carrier, and becomes a mere warehouseman or ordinary bailee, the degree of responsibility resting upon him becomes changed, and from that moment, if the goods are lost by misdelivery or otherwise, it becomes a question of fact whether he has exercised reasonable care and caution. If the relation of carrier has, under the circumstances, ceased, and the carrier stands in the attitude of bailee merely, he is no longer an insurer of the safety of the goods, nor is he precluded from showing that their loss, even though it may have been by misdelivery, has been occasioned by some other cause than his negligence or want of caution. In such cases the law as to the accountability of ordinary bailees becomes applicable. But when the carrier claims exemption on the ground that, under the particular circumstances of the case, he held the goods, not as a carrier, but as an ordinary bailee, it devolves upon him to show, not only that he has done his whole duty to effect a delivery, according to the course of his business, but that he has been guilty of no negligence which has caused or contributed to the loss.³

Sec. 685. (§ 355.) Liability as warehouseman when goods refused or consignee cannot be found.—Whenever the carrier can show that the delivery was impossible, from inability to find the consignee, or from his refusal to accept the goods, or from his unreasonable delay in taking them away, when that duty devolves upon him according to the course of the business of the carrier, or that from any other cause his obligation as carrier has ceased and the less burdensome one of warehouseman has supervened, he may further show that the loss which

3. *Wilson v. Railroad Co.*, 94 418, 16 N. Y. Supp. 220; s. c. 58 Cal. 166, 29 Pac. Rep. 861, 17 Hun, 347, 11 N. Y. Supp. 871; *L. R. A.* 685, citing *Hutch. on Diamond Joe Line v. Carter*, 76 Carr.; *Oderkirk v. Fargo*, 61 Hun, Ill. App. 470.

has occurred was not attributable to his fault or negligence, and thereby exonerate himself from liability.⁴ If, for instance, the goods have been destroyed by an accidental fire;⁵ by an explosion of dangerous goods, of the character of which he was not aware;⁶ by leakage from a defect in a cask;⁷ or have depreciated in market value;⁸ or have been lost by theft or robbery, without the fault or negligence of the carrier,⁹ and he can show that his relation to the goods as common carrier had, before such loss, been changed to that of a mere custodian of the goods for the consignor or owner, he will be excused, although he would have been unquestionably liable in his character as carrier.

Sec. 686. (§ 356.) Same subject.—It therefore frequently becomes a question of importance as well as of difficulty to

4. When the carrier tenders the goods to the consignees who refuse to accept them, its duty as a common carrier ceases and its subsequent liability is that of a warehouseman. *Manhattan Rubber Shoe Co. v. Railroad Co.*, 41 N. Y. Supp. 83, 9 App. Div. 172.

A shipper cannot order the railroad's agent at the point of destination to deliver the goods from time to time as he might direct, and still hold the railroad to the strict liability of a common carrier during the indefinite period in which he undertakes to leave them in the hands of the carrier for distribution. The railroad's liability in such case terminates with the safe carriage and warehousing of the property at the point of destination, and the carrier's agent, for the purpose of its distribution, becomes the agent of the consignee. For loss of the goods in such case after the liability of the railroad has terminated as a common carrier, the shipper must look to the

warehouseman for redress — whether the warehouseman be the initial carrier, a connecting carrier or some one with whom the carrier has stored the goods pending their removal by the consignee. *Railroad Co. v. Carter*, 165 Ill. 570, 46 N. E. Rep. 374, 36 L. R. A. 527, reversing 62 Ill. App. 618.

5. *Fenner v. Railroad Co.*, 44 N. Y. 505; *Stapleton v. Railroad Co.*, 133 Mich. 187, 94 N. W. Rep. 739; *Hasse v. Express Co.*, 94 Mich. 133, 53 N. W. Rep. 918, 34 Am. St. Rep. 328; *Treleven v. Railroad Co.*, 89 Wis. 598, 62 N. W. Rep. 536; *Adler v. Weir*, 96 N. Y. Supp. 736.

6. *Weed v. Barney*, 45 N. Y. 344.

7. *Hudson v. Baxendale*, 2 Hurl. & N. 575.

8. *Kremer v. Southern Express Co.*, 6 Cold. 356; *Fisk v. Newton*, 1 Denio 45.

9. *Neal v. Railroad Co.*, 8 Jones (Law) 482; *Byrne v. Fargo*, 73 N. Y. Supp. 943, 36 Misc. 543.

determine when and under what circumstances the relation of carrier to the goods has ceased and their custody has become a mere bailment. It may be stated as a general proposition that when the carrier has done all that the law requires of him towards accomplishing a delivery, and from any cause fails to effect it, and the goods are of necessity continued in his possession, he from that time becomes responsible only as a depositary.¹⁰ But the circumstances required to produce this change of relation and responsibility are very different in respect to different kinds of carriers. As they are not all required to make delivery of the goods in the same manner, so the steps taken by one to perform his duty in this regard which would change the measure of his liability would have no such effect upon that of another engaged in a different branch of the business. The great majority of those who come under the denomination of common carriers are presumed, as we have seen, to undertake to deliver to the person for whom the goods are intended, personally, and in order to avoid that responsibility they must show that the long habitual and well known course of their business authorizes a departure in that respect from the ordinary mode.

II. DELIVERY BY CARRIER BY WATER.

Sec. 687. (§ 357.) Carriers by water not required to make personal delivery.—But there are several classes of carriers who, without regard to custom or usage, have been excepted from the operation of this general rule, because, owing to the mode of transportation which they employ, a personal delivery by them would be wholly impracticable. These are carriers by railway and carriers by water. It has been already stated that, from the earliest times, ships which brought goods from foreign countries under bills of lading were understood to

10. *Gregg v. Railroad Co.*, 147 Frank Co. (Tex. Civ. App.), 48 S. Ill. 550, 35 N. E. Rep. 343, 37 W. Rep. 210, citing *Hutch. on Am. St. Rep.* 238, citing *Hutch. Carr. on Carr; Railway Co. v. A. B.*

contract to carry only from port to port, and that they were never required to make a personal delivery of the goods, but were only required to land them upon the wharf, or other proper place, and give notice to the consignee or owner.¹¹ The reasons for this exception obviously apply to all carriers by water. They are confined to the limits and courses of the waters upon which they navigate their vessels, and cannot leave them with their vehicles of transportation to seek the consignee or other person entitled to the goods, upon the land. To require of them, therefore, a delivery to the consignee personally would oblige them to employ land as well as water carriage, at every point at which they had a delivery to make, which would impose upon them an intolerable hardship. The same rule, as to the mode of delivery, has therefore been extended to all such carriers; and if the consignee is not present to receive the goods, they may land them and give him notice of their arrival. It then becomes his duty to come or send for them, and take them away.

Sec. 688. (§ 358.) Must provide suitable place and land goods at proper time—Duty if consignee refuses to accept.—But when such carriers undertake to divest themselves of their charge in this less onerous mode, they must provide a suitable and safe place for the landing of the goods. They cannot put them off at an exposed place and there leave them without further attention at an unreasonable hour, as in the night-time, nor during tempestuous weather, to which they would thus be exposed; nor can they leave them exposed and unprotected upon a wharf, and claim that they have divested themselves of their liability as carriers by having landed the goods and given notice to the consignee to come and get them. If such consignee is not present and ready to receive them, they must be put in a place of safety and kept for him until he has had a reasonable time after notice to call for them. “Such a delivery, to be effectual, should not only be at a proper place, which is

11. *Hyde v. Trent Mersey Nav. Co.*, 4 Pick. 371; *Union S. B. Co. Co.*, 5 T. R. 389; *Cope v. Cordova*, 73 Ill. 506.

1 Rawle, 203; *Chickering v. Fow-*

usually the wharf, but at a proper time. A carrier who would deposit goods on a wharf at night or on Sunday, and abandon them without a proper custodian before the consignee had proper time and opportunity to take them into his possession and care, would not fulfill the obligation of his contract. When the goods are not accepted by the consignee, the carrier should put them in a place of safety; and, when he has so done, he is no longer liable on his contract of affreightment.”¹²

12. *Richardson v. Goddard*, 23 How. 28; *Price v. Powell*, 3 Coms. 322; *Redmond v. Steamboat Co.*, 56 Barb. 320; *s. c.* 46 N. Y. 578; *Scheu v. Benedict*, 116 N. Y. 510; *Richmond v. Steamboat Co.*, 87 N. Y. 240; *Hermann v. Goodrich*, 21 Wis. 536; *Ostrander v. Brown*, 15 Johns. 39; *Gibson v. Culver*, 17 Wend. 305; *Merwin v. Butler*, 17 Conn. 138; *Blossom v. Smith*, 3 Blatch. 316; *Ely v. S. B. Co.*, 53 Barb. 207; *Mayell v. Potter*, 2 Johns. Cas. 371; *The Peytona*, 1 Ware, 541; *The Grafton*, Olcott, 42; *Chickering v. Fowler*, 4 Pick. 371; *The Peytona*, 2 Curtis, 21; *Gatliffe v. Bourne*, 4 Bing. N. C. 314; *s. c.* 3 Man. & Gran. 643; *Dean v. Vaccaro*, 2 Head, 488; *Northern v. Williams*, 6 La. Ann. 578; *Segura v. Reed*, 3 *id.* 695; *Shenk v. Steam Propeller Co.*, 60 Penn. St. 109; *The Eddy*, 5 Wall. 481; *Vose v. Allen*, 3 Blatch. 289; *Withers v. N. J. etc. Co.*, 48 Barb. 455; *Rowland v. Miln*, 2 Hilton, 150; *Wilson v. Shipping Co.*, 24 Fed. Rep. 815; *Ex parte Easton*, 5 Otto, 75; *Western Transp. Co. v. Hawley*, 1 Daly, 327; *The M. C. Currie*, 132 Fed. 125; *The Richard Winslow*, 67 Fed. 259.

In *The Captain John*, 33 Fed. Rep. 927, it is said: “Upon the refusal of the consignee to receive the goods, it was the duty of

the propellor as a common carrier to store the [goods] properly on account of the consignor until he could be found. This duty is a maritime one, and for any neglect or imperfect performance of it the vessel is liable *in rem* for damages.” *Richardson v. Goddard*, 23 How. 39; *The Surrey*, 26 Fed. Rep. 791, 794.

“It is true that a carrier does not remain under the very strict liability of a carrier after a delivery on the wharf, notice to the consignees and a reasonable time for the consignees to take the goods away; but the carrier, after such time, is not justified in failing to exercise reasonable care for the preservation and protection of the goods. He is no longer charged with the strict liability of a carrier, but he is charged with the liability of a warehouseman or bailee, having the duty of exercising reasonable care and attention to prevent loss or injury to the goods.” *The Titania*, 124 Fed. 975, *affirmed in* 131 Fed. 229, 65 C. C. A. 215.

When a consignee refuses to receive the goods, the master is authorized to land and store the cargo at the nearest proper and convenient port, having reference to his own convenience and the apparent best interests of the

Sec. 689. (§ 359.) Must give notice of arrival and allow reasonable time for removal.—The carrier in such cases is considered as retaining the custody of the goods, and is responsible for their safety, at least until he has given notice of their arrival to the consignee; and it has been held that his liability as carrier continues even after that, until the consignee has had a reasonable time for their removal. “A discharge from a vessel,” it was said by Allen, J., in *Redmond v. The Steamboat Company*,¹³ “at a proper place, seasonable hour, and upon due notice to the consignee, does not discharge the carrier from all responsibility for the safety of the goods. It may, under some circumstances, be regarded as a delivery to the consignee, and a performance of the contract of affreightment, so as to discharge the ship-owner from the stringent liability of a carrier, but such cases are exceptional, and as a rule, if for any reason the consignee does not appear to claim the goods, or does not receive them, it is the duty of the carrier to provide a proper place of deposit, or in case of imported goods, subject to duty, to see that they are in proper custody. The general rule is, and to it there are no recognized exceptions, if the consignee

owner; always, of course, acting prudently and in good faith. The *Scandinavia*, 49 Fed. 658.

If, however, the consignee has due notice of discharge, and accepts the goods, the duty of protecting the property is cast upon him, and the ship is released if the property is thereafter injured while lying in an exposed position. The *St. Georg*, 104 Fed. 898, 44 C. C. A. 246, *reversing* 95 Fed. 172.

A provision in a bill of lading that “the consignee of the said goods is hereby bound to be ready to receive the same from the ship’s side, either on the wharf or quay, at which the ship may lie for discharge” does not protect the ship from liability for failure to

exercise reasonable care in taking care of perishable goods, on the ground that there had been a delivery to the consignee, where the ship’s officers refused to allow the consignee’s servants to remove the goods, although having no claim thereon for freight. The *Ainwick*, 135 Fed. 884.

Different cargoes, of course, require a different degree of care. If “stearine” is shipped as “tallow” the stevedore is entitled to rely on the description in the bill of lading, and the ship is not liable if the stearine is placed in a place suitable for tallow, but unsuitable for stearine, and the stearine is thereby injured. The *Mississippi*, 76 Fed. 375.

13. 46 N. Y. 583.

is unable or refuses to receive the goods, the carrier is not at liberty to leave them on the wharf, but it is his duty to take care of them for the owner. . . . It follows that until this is done, the liability of the carrier continues. If it be conceded that a carrier by water may discharge himself from liability by delivering merchandise upon a wharf, with notice to the consignee, the latter is entitled to a reasonable time to remove them, and they are at the risk of the carrier until a reasonable time for such removal has elapsed; and a right to put the goods in store for the consignee does not exist until the latter has had a reasonable time for their removal."¹⁴

Sec. 690. (§ 360.) Notice must be actual.—The notice to the consignee of the arrival of the goods must be actual, and the mere publication of the fact in a newspaper, without proof that it was brought home to his knowledge, will be insufficient.¹⁵ And if it be intended that he shall call for and remove

14. *Price v. Powell*, 3 Com. 322; *Russell Manufg. Co. v. Steamboat Co.*, 50 N. Y. 121; *McAndrew v. Whitlock*, 52 *id.* 40; *Gleadell v. Thompson*, 56 *id.* 194; *Salmon Falls Co. v. The Tangier*, 1 Clifford, 396; *Crawford v. Clark*, 15 Ill. 561; *The Titania*, 131 Fed. 229, 65 C. C. A. 215, *affirming* 124 Fed. 975; *Smith v. Steamship Co.*, 123 Fed. 176; *The Ravendale*, 75 Fed. 413; s. c. 75 Fed. 408, 410.

In *Rosenstein v. Vogemann*, 92 N. Y. Supp. 86, 102 App. Div. 39, the bill of lading provided that the goods were to be taken from the ship by the consignees directly they came to hand in discharging the ship and that the carrier's responsibility was to cease package by package immediately the goods left the ship's deck or tackle. The vessel did not have any usual wharf, or, if she had, such wharf was unavailable for use at the time of

her arrival. The consignee did not receive notice of the arrival of the vessel until 2 or 3 o'clock p. m. on the day of its arrival. The goods were unloaded the next day, and at about 5 p. m. the pier collapsed under their weight, and the goods were destroyed. The court held the carrier's liability had not ceased, as the consignee had not been given sufficient notice under the circumstances.

15. *Kohn v. Packard*, 3 La. 225; *McKeon v. See*, 4 Rob. (N. Y.) 449.

A notice to a clerk or other person in charge of the consignee's place of business fulfills the carrier's duty. So a carrier has a right to rely upon the apparent authority of a consignee's wife to represent her husband in such a matter and is not bound to seek him out personally where she is in the consignee's place of business, apparently in charge during

the goods on the same day upon which it is given, it must be given at such time of the day as will give the opportunity of removing them before the expiration of business hours; otherwise he will be entitled to a reasonable time on the next day to complete their removal, and the carrier will, in the meantime, remain responsible for the safe custody of so much of them as could not have been removed by the exercise of reasonable diligence.¹⁶ And if the carrier takes the risk of sending notice of the arrival of the goods by mail instead of by a messenger, he must bear the consequences of any delay in its receipt occasioned thereby.¹⁷ But a custom to notify by mail is reasonable and valid, if established.¹⁸

Sec. 691. (§ 361.) Goods must be put in situation for removal.—And not only must actual notice be given, but the law requires of the carrier a due and proper separation and designation of the goods for the use of the consignee. They must be put in such a situation as to be open to his inspection, and so as to be conveniently accessible and a fair opportunity afforded for their removal. The notice will be of no avail if, when the consignee calls for his goods, they are so mingled with or covered by other goods that the consignee cannot inspect or remove them without himself undertaking their selection and separation from the heap.¹⁹ Until this is done by the carrier the goods are not ready for delivery.²⁰

his absence. *King v. Steamboat Co.*, 73 N. Y. Supp. 999, 36 Misc. 555.

16. *Segura v. Reed*, 3 La. Ann. 695; *Price v. Powell*, 3 Com. 322.

17. *Solomon v. S. B. Co.*, 2 Daly, 104.

18. *Roth Clothing Co. v. Steamship Co.*, 88 N. Y. Supp. 987, 44 Misc. 237; s. c. 86 N. Y. Supp. 25; *Friedman v. Metropolitan S. S. Co.*, 90 N. Y. Supp. 401, 45 Misc. 383.

19. *The Eddy*, 5 Wall. 481; *The Ben Adams*, 2 Ben. 445; 3 Kent's

Com. 215; *The Titania*, 131 Fed. 229, 65 C. C. A. 215, *affirming* 124 Fed. 975.

20. *Goodwin v. Railroad*, 58 Barb. 195.

In the absence of a special agreement to that effect, however, a carrier is not obliged to leave heavy castings weighing several tons each in such a position that they may be readily placed together. *Hudson River Lighterage Co. v. Wheeler, etc., Co.*, 93 Fed. 374.

Sec. 692. (§ 362.) Consignee not to be requested to remove goods on Sunday or a legal holiday on which labor is forbidden.

—Nor can the goods be landed and the consignee required to accept them or take them away on the Sabbath day or upon any legal holiday on which labor is forbidden. But the fact that the day is a fast day by proclamation or a holiday, unless labor be interdicted, will afford no excuse to the consignee for not receiving and removing the goods; and if he fail to do so, and they are lost by the delay, the loss must be borne by him and not the carrier. “The policy of the law,” says Grier, J., in *Richardson v. Goddard*,²¹ “holds the carrier to a rigorous liability, and in the discharge of it he is not bound to await the convenience or accommodate himself to the caprice or conscientious scruples of the consignee. The master of a ship usually has a certain number of lay-days. He is bound to expedite the unloading of his vessel in order to relieve the owners from the expense of demurrage, and to liberate the ship from the onerous liability of the contract of affreightment as soon as possible. He has six days of the week in which to perform this task, and has a right to demand the acceptance of his freight by the consignee. The consignee may think it proper to keep Saturday as his Sabbath, and to observe Friday as a fast day or other church festival, or he may postpone the removal of the goods because his warehouse is not in order to receive them; but he cannot exercise his rights at the expense of others, and compel the carrier to stand as insurer of his property, to suit his convenience or his conscience.” It was, therefore, in that case held that the fact that the governor of a state had appointed a day as a general fast day did not interfere with the right of the master of the vessel to continue the unloading of the goods, nor with the obligation of the consignee to accept and take them away; and the latter, having delayed the removal of the goods from the

21. 23 How. 28. In *Gates v. “Labor Day”* — a holiday — the Ryan, 37 Fed. Rep. 154, where the court held the consignee not bound to begin receiving until Saturday and the next Monday was Tuesday.

wharf, upon which they had been landed for him, in order to observe the day as a holiday, in consequence of which they were consumed by an accidental fire, it was held that he should bear the loss, and not the carrier.

Sec. 693. (§ 363.) Same subject—Fourth of July.—So it has been held in New York that the Fourth of July not being by law a legal holiday in that state except for certain specific purposes, there was no legal reason why the carrier might not on that day tender the goods and insist upon their acceptance, or why the consignee should be relieved from his duty to call for and accept them. But it was at the same time held that evidence of usage not to tender nor to receive goods on that day should have been submitted to the jury, and that they should have been instructed that if such a usage or established course of dealing was proven, the consignee was entitled to a reasonable time after that day to remove the goods.²²

Sec. 694. (§ 364.) Consignee must remove goods within reasonable time.—The consignee in such cases must be prepared to proceed with ordinary dispatch in the removal of the goods, and cannot, of course, continue the responsibility of the carrier beyond such reasonable time as would be necessary, in the ordinary course of such business, to remove the goods to a safe shelter at a reasonable distance from the wharf or landing.²³ He cannot choose an unusual or distant place of storage, and insist that the carrier shall continue the insurer of the

22. *Russell Manufg. Co. v. Steamboat Co.*, 50 N. Y. 121. But see *Scheu v. Benedict*, 116 N. Y. 510, where it is said that the consignee was not required to proceed with the unloading of a vessel on the Fourth of July.

23. "The general rule," says *Benedict, J.*, "is that when the cargo has been landed at a suitable time, upon a suitable pier, and so placed on the pier that it can be examined by the consignee and removed from the pier, the

liability of the ship-owner as a common carrier in respect to such cargo terminates after the expiration of such a period of time after the goods are landed as may be reasonable to enable the consignee to examine and remove it, provided the consignee be informed of the time and place of landing." In *Liverpool, etc., S. Co. v. Suitter*, 17 Fed. Rep. 695, citing *Richardson v. Goddard*, 23 How. 28. See also, *De Grau v. Wilson*, 17 Fed. Rep. 698.

safety of his goods until he can move them piece by piece to it. He must himself take the consequences of delay beyond what may fairly be considered, according to usage and the course of business, a reasonable time; and if there be an unusual delay, whether by reason of the distance to which the goods must be hauled, or from any other circumstances in the situation of the consignee, and the goods are thereby lost, the carrier cannot be held liable.²⁴ All that the consignee can claim is, that he shall have the time which would be necessary, under the usual and ordinary circumstances, to provide for the care and removal of the goods. Nor can the carrier land the goods at a wharf or other place unnecessarily and unreasonably distant from the place of business of the consignee, and require of him their removal within such time as would have been considered reasonable had they been brought within the proper distance. In this regard the rights and duties of the carrier and of the consignee are reciprocal.

24. *Hedges v. Railroad Co.*, 49 N. Y. 223.

One day is a reasonable time for removing 63 bales of hops to a distance of one mile, and after the expiration of that time, the carrier is liable only as warehouseman. *Brand v. Steamboat Co.*, 30 N. Y. Supp. 903, 10 Misc. Rep. 128.

After a consignee had been notified of the arrival of cotton on Saturday afternoon, and he allowed it to remain on the dock until the following Wednesday, when it was destroyed by fire, the carrier was held not liable for the loss. Nor was the liability of the carrier affected by the fact that part of the cotton had not been unloaded at the time of the fire, it appearing that it was in the hold of the vessel surrounded by other freight and could not be delivered until such freight was re-

moved. *Wynantskill Knitting Co. v. Murray*, 90 Hun, 554, 36 N. Y. Supp. 26.

Allowing whiskey to remain on the dock three days after notification of arrival is unreasonable, and if the goods are then lost, proof of negligence on the part of the carrier is necessary. *King v. Steamboat Co.*, 73 N. Y. Supp. 999, 36 Misc. 555.

If the bill of lading specifically allows the master of the ship several distinct methods of discharging the cargo after notice to the consignee, and the consignee fails to take possession of or give directions concerning the goods to the carrier, the carrier, after the lapse of a reasonable time, may adopt any one of the designated methods of discharge, and having chosen to leave the matter to others, the consignee cannot then complain of the apparent slowness

Sec. 695. (§ 365.) Diligence required of carrier in giving notice to consignee.—The degree of diligence to be exercised by the carrier in his efforts to find the consignee, when the goods are required to be delivered to him personally, and he is unknown, has already been considered.²⁵ As the constructive delivery by notice, in the case of carriers by water, is allowed as a substitute for a personal delivery, the same care will be required of him in finding, under similar circumstances, the person who is entitled to the notice of the arrival of the goods. It is indeed essential, to constitute a valid constructive delivery by depositing the goods upon the wharf or other place of landing, that the notice should be given to the consignee, if he can be found by reasonable efforts; and if it should appear that he could have been found had such efforts been made, but that they were not made, the carrier would undoubtedly be liable for the loss of the goods whether he had left them exposed or had stored them safely for the consignee; because his liability as carrier would have continued from the fact that he had failed to use the proper diligence to divest himself of that relation to the goods. For when the consignee is unknown to the carrier, a due effort to find him is a condition precedent to a right even to warehouse the goods; and, as notice to the consignee takes the place of a personal delivery of the goods, and as a due and unsuccessful effort to find him will alone excuse the want of such notice, it follows that if it be not made, the carrier will continue liable for their safety as carrier.²⁶

Sec. 696. (§ 366.) Necessity of notice may be waived by usage.—The necessity of notice may, however, be waived by the previous course of dealing between the parties in which it has not been required; as where the consignee had been in the habit of daily calling for and receiving from the carrier's

of the ship's agent in accomplishing what he might possibly have done in less time. *Knott v. 100 Bales of Rags*, 60 Fed. 634.

25. *Ante*, § 674.

26. *Zinn v. The Steamboat Co.*, 49 N. Y. 442; *Sherman v. Railroad*, 64 *id.* 254; *Union S. B. Co. v. Knapp*, 73 Ill. 506.

wharf shipments of goods from a factory, consigned to him for sale as its agent, and from this long continuance must have known that, in the ordinary course of business, goods would be awaiting him each day at the wharf.²⁷ Or the carrier may show that the uniform usage and course of business of carriers in the same trade in which he is employed has been to leave the goods at the wharf or other places of landing, without notice to the consignee; or that, in the manner of delivery adopted by him, even though it might have been without notice to the consignee, he has conformed to the usage and custom of the locality;²⁸ and this, it would seem, whether the usage was known to the shipper or not,²⁹ every person who contracts with another for services in his particular trade being understood to contract with reference to the usage of that trade.³⁰ The carrier may, therefore, show, as has been repeatedly held, the usage as to the manner of delivery of goods by those engaged in the carriage of goods by water, in the particular port or at the particular place of delivery, and that he has acted according to it.³¹

27. *Russell Manufg. Co. v. Steamboat Co.*, 50 N. Y. 121; *Ely v. Steamboat Co.*, 53 Barb. 207.

28. *Gibson v. Culver*, 17 Wend. 305; *Ostrander v. Brown*, 15 Johns. 39; *Van Santvoord v. St. John*, 6 Hill, 157; *Stone v. Rice*, 58 Ala. 95.

29. *Farmers' & Mechanics' Bank v. The Champlain Trans. Co.*, 16 Vt. 52; 18 *id.* 131; 23 *id.* 186.

30. *Loveland v. Burke*, 120 Mass. 139; *Barnes v. Foley*, 5 Burr. 2711.

31. *Dixon v. Dunham*, 14 Ill. 324; *Crawford v. Clark*, 15 *id.* 561; *Sleade v. Payne*, 14 La. Ann. 453; *McKeon v. See*, 4 Robt. (N. Y.) 449; *Gatliffe v. Bourne*, 4 Bing. N. C. 314; *Garside v. Trent Nav. Co.*, 4 T. R., 581; *Railroad Co. v. Naive*, 112 Tenn. 239, 79 S.

W. Rep. 124, 64 L. R. A. 443, citing *Hutchinson on Carr; Railroad Co. v. Carter*, 165 Ill. 570, 46 N. E. Rep. 374, 36 L. R. A. 527, *reversing* 62 Ill. App. 618, and citing *Hutchinson on Carr*.

This effect of usage in doing away with the requirement of notice in cases of carriers by water is one of importance, especially in river navigation. Such carriers, especially upon our western rivers, rarely, if ever, give notice to the consignees of freight, which is put off for them at the numerous places of landing upon these streams, unless the delivery be at some port. It seems to have grown into a universal understanding in such cases, that the mere deposit of freight upon the bank of the river at the usual

Sec. 697. (§ 366a.) Necessity of notice may be dispensed with by contract.—The necessity of notice may also be waived by contract, as by a stipulation to that effect in the bill of lading. Under such a provision the consignee is bound to watch for the ship's arrival, and be ready to receive the goods

place of landing is all that the carrier is expected to do. Having grown into a universal custom, and being so understood between the parties, there can be no doubt but that the carrier, in so depositing ordinary freight, has done his duty without giving notice to the consignee. Such a course might in most cases be also defensible upon the ground that such had been the course of dealing between the carrier and consignee. See *Stone v. Rice*, 58 Ala. 95.

The case most directly in point as to the legal effect of such usage, whether of the particular carrier or of the class to which he belongs, is that of the *Farmers' & Mechanics' Bank v. The Champlain Transportation Company*, 16 Vt. 52; 18 *id.* 131; 23 *id.* 186. A package of money was delivered by the teller of a bank at Burlington to the captain of the defendants' boat, to be carried to Plattsburg, where it was in the habit of touching to put off freight, for another bank in the latter place. When the boat arrived at Plattsburg the captain delivered the package to the wharfinger, there to be carried to the bank. No notice was given to the bank of the arrival of the package, and before its delivery, and whilst in the wharfinger's possession, it was stolen. The owners of the boat were sued by

the Burlington bank for the value of the package, and upon the trial the defendants offered to prove that it had always been the constant, uniform and unvaried usage and custom of all the boats belonging to the defendants, when they received packages of money, like the one in question, to carry to any place on the lake, and particularly to the bank at Plattsburg, to deliver them to the wharfinger to be carried to the bank without giving notice to the consignee. This evidence was objected to and excluded by the court, and the jury returned a verdict for the plaintiff. The supreme court was, however, of opinion that the inferior court had erred in the exclusion of this evidence, and its judgment was, on this ground, reversed, and the case remanded for another trial. 16 Vt. 52. The case again came before the supreme court (18 Vt. 131), and the question was directly made whether, conceding that the usage of the carrier might justify a departure from the general rule as to delivery, it was necessary that that usage should be known to the plaintiff. Upon this subject the court held that, "in the absence of any special contract between the parties in relation to the subject, the duty and liability of the defendants must be determined by the law applicable to carriers of *this*

at the time and place they are deliverable; and in default the ship may land the cargo without previous notice.¹ But such a contract does not relieve the ship-owners from the duty of

description. This liability may be modified by contract, by the general usage of the business, or by the defendants' particular usage. This was evidently the opinion of this court when the case was before it upon a former occasion. Indeed the case was then opened upon the ground that the evidence of custom and usage, offered by the defendants, should have been received. It is true that upon that occasion the defendants offered to prove that the custom and usage upon which they relied were known to the plaintiffs; but it is very obvious that the learned judge who then delivered the opinion of the court did not consider it material that the usage and custom should be known to the plaintiffs. He says: 'The court, however, are not called upon to decide whether this knowledge is of any importance. If the evidence had been admitted, and it had fallen short of establishing the fact of personal knowledge in the plaintiffs, I am not prepared to say that the defendants would be liable.'

"But whatever may have *heretofore* been the views of the court upon this point, a majority are now of opinion that it is not necessary to prove that the plaintiff had personal knowledge of the usage in order to make it available to the defendants. The case of *Van Santvoord v. St. John et al.*, 6 Hill, 157, has a direct bearing upon the case at bar. The doctrine of that case is in sub-

stance this: that where goods are delivered to a carrier marked for a particular place, without any directions as to their transportation or delivery, except such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether the consignor knew of such usage or not. With the reasoning and authority of that case we are well satisfied. It is founded in good sense and is sustainable upon principle. The case at bar was put to the jury by the county court upon the supposition that, in order to enable the defendants to avail themselves of the usage, upon which they relied as a defense, the jury must find that the plaintiffs had knowledge of the usage. This, we think, was clearly erroneous, and for this error the judgment of the county court is reversed." The case came again, for the third time, before the supreme court (23 Vt. 186) when the same opinion, substantially, was expressed upon the question of the extent to which the carrier might rely upon the usage and custom of his business to justify the delivery to the wharfinger without notice to the consignee. And see *McMasters v. The Railroad*, 69 Penn. St. 374.

1. *The Boskenna Bay*, 40 Fed. Rep. 91; *Constable v. National Steamship Co.*, 154 U. S. 51, 14 Sup. Ct. R. 1062, 38 L. Ed. 903.

exercising reasonable care to protect the goods so long as they are, or ought to be, under the control of the master. Hence, if they are negligently exposed to peril, the contract will furnish the ship-owners no defense.²

Sec. 698. (§ 366b.) At what wharf delivery shall be made.

—Where the contract of carriage specifies the wharf, dock or other landing place at which the delivery shall be made, the contract must, of course, govern in this respect unless some other place be substituted by the parties.³

Where, however, the contract is silent as to the place, the goods must or may be delivered at the usual wharf according to the usage of the port of delivery with respect to such voyage, or the course of trade between the parties.⁴

2. *The Boskenna Bay*, *supra*; *The Surrey*, 26 Fed. 791; *Constable v. National Steamship Co.*, *supra*.

3. *Johnston v. Davis*, 60 Mich. 56; *McCullough v. Hellweg*, 66 Md. 269.

In *Stricker v. Leathers*, 68 Miss. 803, 9 So. Rep. 821, 13 L. R. A. 600, the defendant steamboat company contracted to deliver plaintiff's goods at a private landing. The defendant afterwards refused to do so, but wilfully and without any excuse therefor delivered them at another place. It did so for the purpose of harassing and injuring plaintiff. The plaintiff was held entitled to recover both compensatory and punitive damages.

4. *Richmond v. Steamboat Co.*, 87 N. Y. 240; *Gatliffe v. Bourne*, 4 Bing. N. C. 314; *Salmon Falls Mfg. Co. v. The Tangier*, 1 Cliff. 396; *The Boston*, 1 Lowell's Dec. 464; *The Fittler*, 1 Lowell, 114; *Hewlett v. Burrell*, 105 Fed. 80, 44 C. C. A. 362; *Jameson v. Sweeney*, 66 N. Y. Supp. 494, 32 Misc. 645;

s. c. 61 N. Y. Supp. 498, 29 Misc. 584.

A vessel is required to make delivery of cargo within such parts of the port as have become fixed by established usage, if a berth can be obtained there within a reasonable time. If the vessel goes elsewhere, she must make good the extra expense thereby occasioned to the consignee. *Montgomery v. The Port Adelaide*, 38 Fed. Rep. 753.

In *Devato v. Plumbago*, 20 Fed. Rep. 510, it is said: "The limits of the port, as respects a delivery under the bill of lading, turn purely upon the question of fact within what limits ships and merchants have been accustomed to receive and deliver cargoes consigned here, without regard to geographical divisions. . . . Consignees of goods have a right to expect a delivery according to the established custom and usage of the port, and in that part of the port customarily used for the discharge of such goods; and the vessel is bound, and has a right

If the proprietors of the vessel have a wharf at which they usually and regularly deliver goods, delivery at such wharf would be sufficient in the absence of an agreement to the contrary.⁵

Where the vessel has no regular stopping place and there is no usage governing to the contrary, it is said that the consignee if there is but one,⁶ or all the consignees where there are several,⁷ may direct the master to unload at any usual and convenient wharf.

A usage that the majority of the shippers may choose the wharf is good.⁸

to make delivery accordingly. . . . The question in any particular case must be whether the practice of landing at such parts of the port has become so general and so established as to be fairly and reasonably entitled to be recognized as within those limits wherein the merchants of the port ordinarily receive and vessels ordinarily discharge such goods. To show this, proof of usage is necessarily received, and such is its appropriate office."

5. *Dixon v. Dunham*, 14 Ill. 324. But they are not obliged to discharge there if good reasons exist for discharging elsewhere—as that their dock is full. *Arnold v. Steamship Co.*, 29 Fed. Rep. 184.

6. In *Richmond v. Steamboat Co.*, 87 N. Y. 240, Earl, J., says: "When an ocean vessel reaches the port of delivery with a cargo consigned to several different parties, the carrier may generally select any suitable and proper wharf for the delivery. No other mode of delivery might be practicable, and hence usage and custom sanction such a delivery. Of course, a

usage could obtain which would make a different delivery obligatory. When an ocean vessel comes into the port of delivery with a cargo all consigned to one consignee, it is not always true that the carrier can select the wharf at which delivery shall be made. It being indifferent to the carrier in such a case, unless there is a different usage, it is believed the consignee would have the right to designate the place of delivery. Such right the consignee would certainly have if he could show that such was the usage and custom at the port of delivery." See also, *Steamboat Sultana v. Chapman*, 5 Wis. 454; *Dixon v. Dunham*, 14 Ill. 324; *The Fittler*, 1 Lowell, 114

The assignment of a bill of lading by a consignee vests in his assignee the right to choose the wharf. *Smith v. Lee*, 66 Fed. 344, 13 C. C. A. 506, 21 U. S. App. 650. *The Fittler*, 1 Lowell, 114; *Richmond v. Steamboat Co.*, 87 N. Y. 240.

8. See *Richmond v. Steamboat Co.*, *supra*.

Sec. 699. Delivery at ship's tackle.—It is entirely competent for a shipowner to stipulate in a bill of lading that the goods shall be received by the consignee at the vessel's tackle. The liability of the shipowner is then fixed by contract, and proof of custom is inadmissible. His liability as to any merchandise, after it is discharged from the vessel, becomes that of a bailee, charged with the duty to take ordinary care of the property, and not to abandon it, or to negligently expose it to injury.⁹ But if by the terms of the bill of lading the shipowner, for the purpose of preventing delay or inconvenience should the consignee fail to accept the goods at the vessel's tackle when ready for delivery, undertakes in that event to lighter the goods, and stipulates for no exemption, in legal effect he takes upon himself the common law obligation of a common carrier, and, as such, he becomes responsible for all goods lost or damaged between the vessel and the beach, unless such loss or damage is occasioned by the act of God or the public enemy. And any local usage which is relied on to show an exemption for losses in lightering merchandise occasioned solely by perils of the sea, must be proved as a matter of fact and not of opinion.¹⁰

Sec. 700. Mode of delivery may be established by usage—Delivery to custom house officials.—Carriers by water, in common with all carriers, may have their manner of delivery affected by an established and known usage of their own, with reference to which the contract for carriage must be supposed to have been entered into.¹¹ Thus delivery to custom house officials according to the custom of a port is good as between carrier and shipper, and a vessel is not liable for damages to the goods occurring after such delivery to the custom house

9. *Smith v. Steamship Co.*, 123 Fed. 176.

10. *Ames Mercantile Co. v. Steamship Co.*, 125 Fed. 332.

11. By a custom of the fruit trade at the port of Montreal, the cargo is discharged from the ship to the wharf where it is sorted by persons employed by the ship-owners, and it is only after the

fruit has been sold by auction that it is delivered to the purchasers at the sale upon the order of the consignee. A shipowner, having followed the custom of the trade and retained the charge and control of the cargo of fruit until after the auction sale without any offer to deliver, continued to be responsible for any loss which

officials.¹² But when the terms of a bill of lading are inconsistent with and repugnant to the custom of a port, they must prevail against the custom.¹³

III. DELIVERY BY RAILROADS AS CARRIERS.

Sec. 701. (§ 367.) Not required to make personal delivery of goods—Whether notice of arrival necessary.—The general rule requiring of the carrier a personal delivery to the consignee has been still further modified in favor of railroad companies in a number of our states. Such companies, as common carriers, like carriers by water, cannot deliver at the warehouse or other place of business of the consignee without the employment of other means of transportation than such as they employ upon their tracks.¹⁴ Their cars move upon lines from which they cannot deviate, and they must therefore make their deliveries either at the termination of their routes or at fixed intermediate points. The same reasons therefore exist for dispensing with the rule of personal delivery as to them as in the case of the carrier by water. But the cases are hopelessly in conflict as to just when the liability of a railway company as a common carrier ends or whether notice of arrival of the goods at destination is necessary. Three different rules are recognized in the decisions, familiarly known as the Massachusetts, New Hampshire and New York rules.

Sec. 702. Same subject—Massachusetts rule as to delivery by railroads.—The supreme court of Massachusetts, in several

might occur prior to delivery. *Hart v. Pearson*, 12 Rap. Jud. Que. (C. S.) 540.

12. *The Asiatic Prince*, 108 Fed. 287, 47 C. C. A. 325, *affirming* *Herbst v. The Asiatic Prince*, 103 Fed. 676 and 97 Fed. 343; *The Seguranca*, 68 Fed. 1014.

13. *Parsons v. Hart*, (Can.) 30 S. C. R. 473.

14. It is not the customary duty

of a railroad company to tender the goods it has received for transportation to the consignee, but the goods are kept at the depot or warehouse until the consignee calls for them. And before an action can be maintained against a common carrier, a demand for the goods must be made. *Jarrett v. Railway Co.*, 74 Minn. 477, 77 N. W. Rep. 304.

early cases upon the subject,¹⁵ carried the exemption from the obligation to make an actual delivery further in the case of railway carriers than had even been allowed to carriers by water, and held that all that could be required of railways was a safe deposit of the goods upon the platform or in the warehouse of the road at the end of the transit, to await delivery to the consignee, when he should call for them, and that from the time of such deposit, even without notice by the carrier to the consignee, the liability of the former was changed from that of common carrier to warehouseman. This was said by Shaw, C. J., in *Norway Plains Company v. The Railroad*, to afford a plain, precise and practical rule of duty, of easy application, well adapted to the security of all persons interested. It determines, it was said, that such companies are responsible as common carriers until the goods are removed from the cars and placed on the platform, and that if, on account of their arrival in the night or at any other time when by the usage and course of business the doors of the merchandise depot or warehouse are closed, or for any other cause they cannot then be delivered; or if for any reason the consignee is not there ready to receive them, it is the duty of the company to store them and keep them safely under the charge of careful and competent servants ready to be delivered, and actually to deliver them when duly called for by the parties authorized and entitled to receive them; and for the performance of these duties after the goods are delivered from the cars, the company is liable as warehousemen or keepers of goods for hire only. And as to the giving of notices by such carriers as is required of those who carry by water, it was said that the arrivals of goods by this mode of transportation were so numerous, frequent and various, that it would be nearly impossible to send such special notices to each consignee of each parcel of goods or single article as it arrived, and it was therefore held that such notices should not be required. These decisions of the supreme court of Massachusetts have been repeatedly re-affirmed by that court,¹⁶ and have been approved and followed by the courts

15. *Thomas v. Railroad Co.*, 10 *Railroad Co.*, 1 Gray 263. Met. 472; *Norway Plains Co. v.* 16. *Barron v. Eldredge*, 100

of Georgia,¹⁷ Illinois,¹⁸ Indiana,¹⁹ Iowa,²⁰ Missouri,²¹ North Carolina,²² Pennsylvania²³ and South Carolina.²⁴

Mass. 455; *Stowe v. Railroad Co.*, 113 *id.* 521; *Rice v. Hart*, 118 *id.* 201.

17. *The Southwestern R. R. v. Felder*, 46 Ga. 433; *Western, etc., R. Co. v. Camp*, 53 Ga. 596; *Almand v. Railroad Co.*, 95 Ga. 775, 22 S. E. Rep. 674; *Railway Co. v. Pound*, 111 Ga. 6, 36 S. E. Rep. 312.

18. *Porter v. Railroad Co.*, 20 Ill. 407; *Richards v. Railroad Co.*, 1 *id.* 404; *Chicago, etc., R. R. v. Scott*, 42 *id.* 132; *Merchants' Des. Co. v. Hallock*, 64 *id.* 284. In this case a dispatch or transportation company was put upon exactly the same footing, as to the manner of delivery, as a railroad company. "It appears from the bill of exceptions that appellants own a line of freight cars plying between the Atlantic seaboard and the west, carrying freight at the same tariff of charges the railroad companies do whose tracks they use. Their only business is that of freighters. They have an office in the city of New York and one in Chicago. . . . We see nothing in this case to take it out of the rule so long established by this court. There is no essential difference between this company and a railroad company, and it must be subject to no other or greater liabilities. It differs from an express company in this: that the latter have teams and vehicles by which they receive and deliver goods, and such is the established usage. Their compensation is found in the high rates of transportation, whilst appellants receive only the rates established by

railroads on their ordinary classified freights."

Rothschild v. The R. R., 69 Ill. 164; *Railway Co. v. Kendall*, 72 Ill. App. 105; *Gregg v. Railroad Co.*, 147 Ill. 550, 35 N. E. Rep. 343, 37 Am. St. Rep. 238, *affirming* 47 Ill. App. 590; *Railroad Co. v. Carter*, 165 Ill. 570, 46 N. E. Rep. 374, 36 L. R. A. 527, *reversing* 62 Ill. App. 618; *Schumacher v. Railroad Co.*, 207 Ill. 199, 69 N. E. Rep. 825, *affirming* 108 Ill. App. 520.

19. *Bansemer v. The R. R.*, 25 Ind. 434; *Chicago, etc., R. R. v. McCool*, 26 *id.* 140; *Railway Co. v. Reyman*, — Ind. —, 73 N. E. Rep. 587; *Railroad Co. v. Nash*, 43 Ind. 423.

20. *Mohr v. The R. R.*, 40 Ia. 579; *Francis v. The R. R.*, 25 *id.* 60.

21. *Gashweiler v. Railway Co.*, 85 Mo. 112; *Rapkin v. Railroad Co.*, 55 Mo. 168; *Buddy v. Railroad Co.*, 20 Mo. App. 209; *Transfer Co. v. Neiswanger*, 18 Mo. App. 103; *Bell v. Railroad Co.*, 6 Mo. App. 363; *Wilson Mach. Co. v. Railroad Co.*, 71 Mo. 203; *Pindell v. Railway Co.*, 34 Mo. App. 675; *s. c.* 41 Mo. App. 84; *Standard Milling Co. v. Transit Co.*, 122 Mo. 258, 26 S. W. Rep. 704; *Herf & Frerichs Chemical Co. v. Railroad Co.*, 100 Mo. App. 164, 73 S. W. Rep. 346.

22. *Neal v. Railroad*, 8 Jones (Law), 482; *Chalk v. Railroad*, 85 N. C. 423.

23. *McCarthy v. The R. R.*, 30 Penn. St. 247; *Shenk v. Propeller Co.*, 60 *id.* 109; *Steamship Co. v. Smart*, 107 *id.* 492.

24. *Spears v. Railroad Co.*, 11 S. C. 158.

Sec. 703. Same subject.—These decisions were of course made upon the assumption that every consignee is already advised, either by the consignor or in some other manner, that the goods have been forwarded by the company's line; and that, in consequence of the great regularity of this mode of transportation, compared with that by other modes of conveyance, he will know with reasonable certainty when his goods will arrive, and when it will be his duty to call for them and take them away. It is therefore considered, by those who approve this view of the subject, more reasonable to require of the consignee the duty of sending for his goods at the time at which he is advised they must arrive, than to impose upon the company the task of giving notice, as the goods arrive, to each consignee. It is said, also, that the real contract of the railroad company, as the carrier of merchandise, is only to transport from point to point on its road, and that when it has done this, and has, at the end of the transit, or at their destination, unloaded the goods from its cars and put them in a place of safety for the consignee, ready to be delivered to him whenever he may call for them, it has fulfilled its contract as common carrier; and that, having provided depots and warehouses for the safe deposit and custody of the goods, until the consignee shall call for them, when the goods are safely deposited therein, the new relation of bailor and bailee takes the place of that of carrier and consignee, with a corresponding change in the degree of responsibility.

Sec. 704. (§ 369.) Same subject—New Hampshire rule as to delivery by railroads.—The same questions were brought before the supreme court of New Hampshire in the case of *Moses v. The Railroad*.²⁵ It was said in this case that it would be unreasonable to require of a consignee of goods, being transported by a railroad as common carrier, that he should be in attendance at the precise moment when his goods arrived, to receive or to take care of them, the trains of such roads, as was well known, being more or less irregular in their hours of arrival. Such a requirement, it was thought, would be as

25. 32 N. H. 523.

unreasonable as to require of the road a delivery of the goods at a distance from its track. The arrival of the goods might be in the night or after the close of business hours, and it might be impossible for the consignee to get them away immediately; and that until he had had a reasonable opportunity to remove them, the duty rested upon the carrier to take care of them for him. It thus became a matter of necessity for such companies, transacting business as common carriers, to provide depots and warehouses for the reception of freight at the stations established for its delivery; and if the goods are placed in their warehouses upon its arrival, it cannot be said to be done in any sense for the convenience or accommodation of the consignee, nor be considered, upon any sound view, as equivalent to a delivery. The servants of the carrier still continue in charge of them. They are equally shut off from observation and the oversight of others as when in transit; and if they are lost, damaged or purloined, he has no greater opportunity of ascertaining or proving by whose fault or negligence it was done, than if such loss had occurred during the transportation. Consequently, the same reasons for holding the carrier to extraordinary responsibility during the transportation of the goods exist after their arrival, at least, until the owner or consignee shall have had an opportunity to take them in charge. Supposing that the consignee, it was said, has been advised of the sending of the goods; that he has provided himself with the proper means for their receipt and removal at the earliest opportunity, and that he is also advised of the course of business of the road, and that he will exercise reasonable diligence to be at the place of delivery as soon as practicable after their arrival, it was the opinion of the court that he should be allowed a reasonable time after the arrival of the goods to accept and remove them, during which the company should continue under its original liability, as common carrier, for their preservation; and the conclusion of the supreme court of Massachusetts was, to this extent, expressly disapproved. It was, however, said that "the extent of the reasonable opportunity to be afforded him for that purpose is not to be measured by any peculiar circumstances

in his own condition or situation, rendering it necessary for his own convenience and accommodation that he should have a longer time or better opportunity than if he resided in the vicinity of the warehouse and was prepared with the means and facilities for taking the goods away. If his peculiar circumstances require a more extended opportunity, the goods must be considered after such reasonable time, as but for those peculiar circumstances would be deemed sufficient, to be kept by the company for his convenience and under the responsibility of depositaries and bailees for hire.”

The conclusion reached by the supreme court of New Hampshire has been followed in Alabama,²⁶ Arkansas,²⁷ Kansas,²⁸ Kentucky,²⁹ Louisiana,³⁰ Vermont,³¹ West Virginia³² and Wisconsin.³³

Sec. 705. Same subject—Limitations upon Massachusetts and New Hampshire rules.—All the cases, however, which concede the change of the relation of railroad carriers to the goods from that of common carriers to that of warehousemen at the termination of their transit, and without notice to the consignee of their arrival, require that before such carriers can claim exemption from the more onerous responsibility the goods shall be unloaded from the cars with due care and deposited in a safe and suitable place; and some of them seem

26. Tallahassee Falls Mfg. Co. v. Railway Co., 128 Ala. 167, 29 So. Rep. 203; Bowden v. Railway Co., — Ala. —, 41 So. Rep. 294; Ala. & Tenn. Rivers R. R. v. Kidd, 35 Ala. 209; Mobile, etc., R. R. v. Prewitt, 46 *id.* 63; Louisville, etc., R. Co. v. McGuire, 79 Ala. 395; Louisville, etc., R. Co. v. Oden, 80 Ala. 39.

27. Railway Co. v. Nevill, 60 Ark. 375, 30 S. W. Rep. 425, 28 L. R. A. 80, 46 Am. St. Rep. 208.

28. Leavenworth, etc., R. R. v. Maris, 16 Kan. 333; Railroad Co. v. Wichita Wholesale Grocery Co.,

55 Kan. 525, 40 Pac. Rep. 899; Railway Co. v. Newberger & Bro., 67 Kan. 846, 73 Pac. Rep. 57.

29. Jeffersonville, etc., R. R. v. Cleveland, 2 Bush, 468. See also, Wald v. Railroad Co., 92 Ky. 645.

30. Maignan v. The Railroad, 24 La. Ann. 333.

31. Ouimit v. Henshaw, 35 Vt. 604; Blumenthal v. Brainard, 38 *id.* 402; Winslow v. The Railroad, 42 *id.* 700.

32. Berry v. Railroad Co., 44 W. Va. 538, 30 S. E. Rep. 143, 67 Am. St. Rep. 781.

33. Wood v. Crocker, 18 Wis.

to go even further, and make it essential that they should be put in store.³⁴

Sec. 706. (§ 372.) Same subject.—It is to be further observed that this qualification of the liability and duty of the carrier as to the delivery of the goods is confined to their delivery when they have been carried to their destination, and has no application when, as between successive carriers, it becomes necessary that a delivery should be made by the carrier in charge of the goods to the one next succeeding in order to complete the transportation. In such cases, as we have seen, there must be an actual delivery, unless usage or the course of dealing of the connecting carriers may vary the rule.³⁵

Sec. 707. (§ 373.) Same subject.—These cases which allow to railroad companies an exoneration from their liability as carriers without either a tender of the goods or a notice of their arrival, and especially those which hold that such liability is at an end as soon as the goods have been deposited in their depots or station-houses, certainly make a wide departure from the general rule of law governing the manner of delivery by other

345; *Lemke v. The Railroad*, 39 *id.* 449; *Backhaus v. Railway Co.*, 92 Wis. 393, 66 N. W. Rep. 400.

34. *Porter v. Railroad*, 20 Ill. 407; *Chicago, etc., R. R. v. Bensley*, 69 *id.* 630; *Ala. & Tenn. Rivers R. R. v. Kidd*, 35 Ala. 209.

Evidence that the derrick at the point of destination was so out of repair that the goods could not be unloaded from the cars is competent as tending to show that the defendant's relation as a common carrier had not ceased. *Liverpool Ins. Co. v. McNeill*, 89 Fed. 131, 32 C. C. A. 173, citing *Hutchinson on Carr.*

A railroad's obligation as a common carrier continues until the delivery or offer of delivery is had at the depot or warehouse where such goods are customarily un-

loaded and delivered. Its obligation is not complete when the cars containing the goods are side-tracked in its yards. *Klass Commission Co. v. Railroad Co.*, 80 Mo. App. 164; *Loeb v. Railway Co.*, — Mo. App. —, 85 S. W. Rep. 118.

The carrier must not only safely carry the property, but take it to the place provided for delivery of property of its kind and there place it in a position of accessibility. *Russell Grain Co. v. Railroad Co.*, — Mo. App. —, 89 S. W. Rep. 908.

35. *Ante*, § 131.

See also, *Railway Co. v. Reiss*, 183 U. S. 621, 22 Sup. Ct. R. 253, *affirming* 99 Fed. 1006, 39 C. C. A. 679 and 98 Fed. 533, 39 C. C. A. 149.

common carriers and for reasons which have not been universally considered satisfactory. These reasons, as we have seen, are mainly based upon the regularity of the arrivals of the trains of railway companies and the fact that they are provided with safe and commodious warehouses in which the goods can be stored as soon as they arrive at their destination. The first of these reasons assumes that the consignee will be always advised of the sending of the goods, and that he will know with reasonable certainty the time at which they will arrive and when he should call for them. This is certainly assuming a great deal for the sake of relieving the carrier from his liability. It may not be always true that the person to whom the goods are sent is advised of the fact; and common experience teaches that, however it may have been in the infancy of railways, and may yet be, where the transportation is for a short distance and over a single road, where the goods are to be transported a great distance over several roads or a line composed of a number of such roads, the frequent delays occasioned by excess of freight and various other circumstances make the time of the arrival of the goods consigned by railways oftentimes as uncertain perhaps as it would be by any other mode of transportation. Nor does the fact that such companies are generally provided with secure warehouses seem to be a better reason for the relaxation of the general rule of liability as to them. Even when the goods are deposited in such warehouses, they are still in the custody of the company or its servants. They have the same opportunities to embezzle them, or to combine with others to do so, as when in transit, with perhaps less chance of detection. The goods are still hid from the observation of their owner. He may not have had the opportunity to remove them and may have had no knowledge of their arrival. They may be stolen or destroyed, and he may never know their fate. The same reasons, therefore, upon which is based the severe accountability of the carrier for the safety of his charge, would seem to require that railroad companies should be held to be custodians of the goods in the same character in which they received them until they had either tendered them to the con-

signee or had, after informing him of their arrival, given him a reasonable time within which to take them away. This is, as we have seen, the well-settled law as to carriers by water, and no substantial reason can be urged why the rule should be further relaxed in favor of railroad companies.³⁶

Sec. 708. Same subject—New York rule as to delivery by railroads.—The courts of several of the states in which the question has been well considered have accordingly declined to adopt the reasoning of the preceding cases, and have refused to concede to railroad companies the right to dispense with notice to consignees of the arrival of the goods which they have undertaken to transport as common carriers, but hold them to the same duty in that regard as carriers by water. In New York, the law upon this subject is stated to be that if the consignee is present, upon the arrival of the goods, he must take them without unreasonable delay; if he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he must have a reasonable time to remove them; if he is absent, unknown or cannot be found, the carrier may store them; and if, after notice of the arrival of the goods, the consignee has had a reasonable opportunity to remove them, and does not, he cannot hold the carrier longer as an insurer.¹ This view of the subject has also been taken by

36. *Railway Co. v. Nevill*, 60 Ark. 375, 30 S. W. Rep. 425, 28 L. R. A. 80, 46 Am. St. Rep. 208, citing *Hutch. on Carr.*

1. *Fenner v. Railroad*, 44 N. Y. 505; *Hedges v. Railroad*, 49 *id.* 223; *McDonald v. Railroad*, 34 *id.* 497; *Sprague v. Railroad*, 52 *id.* 637; *Pelton v. Railroad*, 54 *id.* 214.

In the case last cited the plaintiff, to whom the goods were consigned, had very recently become resident four miles distant from the town to which the goods were

directed. When they arrived, no one was present to receive them or to whom notice could be given of their arrival, and her residence was unknown to the agents of the company. The goods were therefore removed from the car into the defendant's warehouse and kept there three days, when, without defendant's fault, they were consumed by fire. While the goods were thus stored, the agent having charge of the warehouse inquired, of persons likely to know, of the plaintiff's place of

the courts of Michigan,² Minnesota,³ Mississippi⁴ and Ohio.⁵ Practically the same result has been reached by statutes in Alabama,⁶ California,⁷ Tennessee⁸ and Texas.⁹ Such, also, is

residence, but gained no information on the subject. This was held to be an abundant excuse for not giving notice, and the case was said to come within the rule as stated in *Fenner v. Railroad*, *supra*. The defendant's character, it was said, had, before the fire, changed to that of warehouseman, and the goods having been destroyed without its fault, the plaintiff could not recover. "The consignee," it was said, "ought, before the arrival of the goods, to give such information as will enable the carrier to give the requisite notice; but whether, if such notice had been given in this case, it would have become their duty to notify the plaintiff, whose post-office address was beyond the municipality of the depot, is not involved."

In *Faulkner v. Hart*, 82 N. Y. 413, the goods arrived and were demanded by the consignee the same day, but delivery that day was refused, to suit the carrier's convenience. The goods were unloaded the same day and placed in carrier's warehouse, where they were burned during the night. The carrier was held liable. To the same effect is *McKinney v. Jewett*, 90 N. Y. 267, though the contract provided for exemption while "awaiting delivery." They were not awaiting delivery until the carrier was ready to deliver them.

See also, *Grieve v. Railroad Co.*, 49 N. Y. Supp. 949; *Manhattan Rubber Shoe Co. v. Railroad Co.*, 41 N. Y. Supp. 83, 9 App. Div. 172;

Diamant v. Railroad Co., 62 N. Y. Supp. 519, 30 Misc. 444; *Becker v. Railroad Co.*, 96 N. Y. Supp. 1, 109 App. Div. 230.

2. *Buckley v. Railroad Co.*, 18 Mich. 121; *McMillan v. Railway*, 16 Mich. 79; *Walters v. Railway Co.*, — Mich. —, 102 N. W. Rep. 745.

3. *Pinney v. Railroad Co.*, 19 Minn. 251; *Derosia v. Railroad Co.*, 18 *id.* 133.

4. *Railroad Co. v. Fuqua & Horton*, 84 Miss. 490, 36 So. Rep. 449.

5. *Railroad Co. v. Hatch*, 52 Ohio St. 408, 39 N. E. Rep. 1042. See *Hirsch v. The Quaker City*, 2 Disney 144.

6. Personal notice or by mail is required in cities or villages of over 2000 inhabitants. *Collins v. Railroad Co.*, 104 Ala. 390, 16 So. Rep. 140.

7. *Wilson v. Railroad Co.*, 94 Cal. 166, 29 Pac. Rep. 861, 17 L. R. A. 685; *Cavallaro v. Railway Co.*, 110 Cal. 348, 42 Pac. Rep. 918, 52 Am. St. Rep. 94, citing *Hutch. on Carr.* See also, *Jackson v. Railroad Co.*, 23 Cal. 268.

8. *Railroad Co. v. Naive*, 112 Tenn. 239, 79 S. W. Rep. 124, 64 L. R. A. 443. See also, *Butler v. Railroad Co.*, 8 Lea, 82; *Central Trust Co. v. Railway Co.*, 70 Fed. 764; *Railway Co. v. Kelly*, 91 Tenn. 699, 20 S. W. Rep. 312, 30 Am. St. Rep. 902, 17 L. R. A. 691; *s. c.* 91 Tenn. 708, 20 S. W. Rep. 314.

9. *Railroad Co. v. Haynes*, 72 Tex. 175.

the English law. No trace is there to be found of the distinction which has been made in this country in favor of railway companies as common carriers, which converts them into mere warehousemen without notice to the consignee. Notice, it is there held, is necessary to effect this change of character and liability; and after such notice, if the consignee fails to call for the goods within a reasonable time, the carrier becomes, as to them, a warehouseman merely.¹⁰ And it is to be gathered from the cases, that it is the universal course of business there, with this class of carriers, either to deliver personally, or to send to consignees what are there denominated advice notes, informing them of the arrival of the goods; and that until this is done, the company remains subject to the liability of a common carrier.

In Delaware,¹¹ Maryland,¹² Nebraska,¹³ Oregon,¹⁴ and Washington,¹⁵ the courts have not made such a clear definite statement of their position on this question that they can be arbitrarily placed under any one of the three preceding rules. The majority of them, however, seem to lean toward the New York rule.

In New Jersey the court seems to recognize no distinction between the rules as to railroad companies and express companies, and has evolved a doctrine which is a combination of the New Hampshire and New York rules.¹⁶

Sec. 709. Same subject—When question of notice becomes immaterial.—The question of notice to the consignee of the

10. *Mitchell v. The Railway Co.*, 10 L. R. Q. B. 256; *Chapman v. Great Western R. W. Co.*, 5 Q. B. D. 278. See also, *Richardson v. Canadian Pacific R. Co.*, (Can.) 19 Ont. R. 369, 45 Am. & Eng. R. Cas. 413.

11. *McHenry v. Railroad Co.*, 4 Harr. 448.

12. *Railroad Co. v. Green*, 25 Md. 72.

13. *Railroad Co. v. Arms*, 15 Neb. 69.

14. *Normile v. Railroad & Nav. Co.*, 41 Ore. 177, 69 Pac. Rep. 928.

15. *Normile v. Railway Co.*, 36 Wash. 21, 77 Pac. Rep. 1087.

16. In the absence of special contract or custom the duty of a common carrier of goods does not end upon the arrival of goods at the place of destination, but the carrier must deliver them to the consignee, and when the contract of carriage contemplates delivery of the goods upon the carrier's

arrival of the goods becomes immaterial, however, when the goods have in fact reached their destination, and on demand by the consignee, the railroad company informs him that they have not yet arrived. And if through such negligence of the railroad company in wrongfully misleading the consignee, the goods are destroyed, the railroad company will be liable as a common carrier and not as a warehouseman.¹⁷ On the other hand, notice to the consignee is unnecessary where he has actual knowledge of the arrival of the goods,¹⁸ or where the address of the consignee is unknown, and the railroad company has failed to find him after due diligence has been used.¹⁹

Sec. 710. (§ 375.) Mode or place of delivery may be established by usage—Effect of usage on consignee's right to notice of arrival of goods.—Railroad companies, in common with all carriers, may be excused from a strict compliance with legal requirements, in the manner and other circumstances of delivery, by an established and known usage of their own, with reference to which the contract for carriage must be supposed to have been entered into. As where goods were sent to a way

premises at the terminus of the route, and no time is stipulated for the arrival of the goods or for their delivery, the duty of making delivery involves either the allowance to the consignee of a reasonable time within which to make inquiries respecting their arrival, or else the duty on the part of the carrier of giving notice of arrival to the consignee; and in either case the allowance to the consignee of a reasonable time and opportunity after notice of the arrival of the goods to take them away. *Burr v. Express Co.*, 71 N. J. L. 263, 58 Atl. Rep. 609. See also, *Railroad Co. v. Ayres*, 29 N. J. L. 393, 80 Am. Dec. 215.

17. *Central Trust Co. v. Railway*

Co. 70 Fed. 764; *Railroad Co. v. White*, 88 Ga. 805, 15 S. E. Rep. 802; *Thyll v. Railroad Co.*, 87 N. Y. Supp. 345, 92 App. Div. 513, *modifying* 84 N. Y. Supp. 175; *Railway Co. v. Kelly*, 91 Tenn. 699, 20 S. W. Rep. 312, 17 L. R. A. 691, 30 Am. St. Rep. 902; *s. c.* 91 Tenn. 708, 20 S. W. Rep. 314; *Berry v. Railroad Co.*, 44 W. Va. 538, 30 S. E. Rep. 143, 67 Am. St. Rep. 781.

18. *Pinney v. Railroad Co.*, 19 Minn. 251; *Fenner v. Railroad Co.*, 44 N. Y. 505; *Normile v. Railway Co.*, 36 Wash. 21, 77 Pac. Rep. 1087.

19. *Kohn v. Packard*, 3 La. 224, 23 Am. Dec. 455; *Pelton v. Railroad Co.*, 54 N. Y. 214; *Fenner v. Railroad Co.*, 44 N. Y. 505.

station, at which it was known to the shipper the road had no warehouse, but had long been in the habit of putting off the goods upon a platform for consignees, who were expected either to be present to receive them or to come for them immediately after their arrival, and it was shown that the plaintiff, who had sued the company for the loss of his goods, put off in this manner and without notice to him, had frequently received goods delivered in this way, and was well aware of the custom, it was held that the company was protected from liability by reason of the usage, the loss having occurred through the delay of the plaintiff in sending for the goods; and the principle of the cases already referred to, as to the effect of usage in controlling the manner of delivery by other carriers,²⁰ was said to be equally applicable to railroad companies.²¹

So a well known and established usage at the point of delivery to give,²² or not to give,²³ notice to the consignee of the arrival of the goods is valid and will be binding in the absence of a provision in the contract of shipment to the con-

20. *Ante*, § 666.

21. *McMasters v. Railroad*, 69 Penn. St. 374. See also, as to sufficiency of delivery by usage or contract, *Pindell v. Railway Co.*, 34 Mo. App. 675; *s. c.* 41 Mo. App. 84; *South, etc., R. Co. v. Wood*, 66 Ala. 167; *Dresbach v. Railroad Co.*, 57 Cal. 462; *The Mill Boy*, 4 McCrary, 383; *Louisville, etc., R. Co. v. Gilmer*, 89 Ala. 534; *Chalk v. Railroad Co.*, 85 N. C. 423; *Stone v. Rice*, 58 Ala. 95.

22. *Herf & Frerichs Chemical Co. v. Railroad Co.*, 100 Mo. App. 164, 73 S. W. Rep. 346; *Bachant v. Railroad Co.*, 187 Mass. 392, 73 N. E. Rep. 642, 105 Am. St. Rep. 408.

In order to show the existence of a custom varying the Massachusetts rule that the liability of a railway company ceases upon the arrival of goods at destina-

tion and their deposit by the carrier in a place of safety, by reason of the railway company having observed a usage of notifying consignees of the arrival of goods, it must be affirmatively shown that such usage was of an established and general nature and uniform, and that the notices given in pursuance thereof were of such a character as to indicate, or to reasonably warrant the inference that the railroad company intended to remain liable as a common carrier until the consignee in each instance had had time and opportunity to remove his goods from the custody of the railway company. *Railway Co. v. Pound*, 111 Ga. 6, 36 S. E. Rep. 312.

23. *Gibson v. Culver*, 17 Wend. 305, 31 Am. Dec. 297; *Railroad Co. v. Naive*, 112 Tenn. 239, 79 S. W. Rep. 124, 64 L. R. A. 443.

trary. Thus a custom at the point of delivery not to give notice on the Fourth of July has been upheld.²⁴

Sec. 711. Bulky freight in car load lots must ordinarily be unloaded by party entitled to it—Package freight.—It is the uniform rule and custom in this country for bulky freight in car load lots to be unloaded by the party entitled to it. All, therefore, that can be required of the railroad company is that it shall place the cars where they may be safely and conveniently unloaded, or place them at the designated place if a certain place has been named in the contract of shipment, and, if notice is required by some rule of law, a binding usage, or the contract, notify the party entitled to the freight of its action. When this has been done, it is held in those states which follow the Massachusetts rule that the relation of warehouseman is established in the absence of any controlling usage or contract to the contrary. But in those states which follow the New Hampshire and New York rules, the relation of warehouseman would not arise until after the lapse of a reasonable time in which to remove the goods.²⁵

Small or package freight, however, belonging to many owners and usually carried in a single car is ordinarily unloaded by the company transporting it, and an owner cannot insist

In *Allam v. Railroad Co.*, 183 Pa. St. 174, 38 Atl. Rep. 709, 39 L. R. A. 535, the shipper entered into a special contract with the carrier to ship his goods to what was termed a "prepaid" station, the same being a small station where the business of the carrier did not warrant it in maintaining a building or keeping an agent. The court held that under the circumstances the shipper must have known that he could not expect notice from the carrier, and that he assumed all responsibility for the goods after they reached their destination.

24. *Railroad Co. v. Naive*, 112

Tenn. 239, 79 S. W. Rep. 124, 64 L. R. A. 443.

25. *Kenny v. Railroad Co.*, 122 Ga. 365, 50 S. E. Rep. 132; *Gregg v. Railroad Co.*, 147 Ill. 550, 35 N. E. Rep. 343, 37 Am. St. Rep. 238; *Schumacher v. Railway Co.*, 207 Ill. 199, 69 N. E. Rep. 825, *affirming* 108 Ill. App. 520; *Railroad Co. v. Kendall*, 72 Ill. App. 105; *Anchor Mill Co. v. Railroad Co.*, 102 Iowa, 262, 71 N. W. Rep. 255; *Railway Co. v. Reyman*, — Ind. —, 73 N. E. Rep. 587; *Miller v. Mansfield*, 112 Mass. 260; *Whitney Mfg. Co. v. Railroad Co.*, 38 S. Car. 365, 17 S. E. Rep. 147, 37 Am. St. Rep. 767.

on the company utilizing the car as a warehouse for its storage.²⁶

Sec. 712. (§ 376.) What is reasonable time for removal.—What length of time will be considered reasonable for the removal of the goods, at the expiration of which the carrier will be regarded as holding them as warehouseman, when such reasonable time is allowed the consignee, it is said, cannot be determined by any fixed or definite rule, but must depend in a great measure upon the circumstances of each case. When the facts are agreed upon or undisputed, it becomes a question to be determined by the court as one of law; but where they are disputed and unsettled, the question must be submitted to a jury.²⁷

Sec. 713. (§ 377.) Situation or condition of consignee immaterial.—It is said, however, that no indulgence will be given to the consignee by reason of the circumstances of his condition or situation, which may make delay in the removal of the goods unavoidable on his part; nor will the distance at which he may reside or have his place of business from the place of their deposit be taken into consideration; but he will be required to remove them with the same expedition as though

The party entitled to the goods cannot be compelled to work on Sunday, nor is he bound to receive goods in the night time. *Railway Co. v. Wichita Wholesale Grocery Co.*, 55 Kan. 525, 40 Pac. Rep. 899.

Where the car is placed upon a spur track and the consignee assumes exclusive dominion over it, the fact that the carrier permits the goods to remain upon the car does not make him liable as a warehouseman for their loss. *Vaughn v. Railroad Co.*, — R. I., — 61 Atl. Rep. 695.

26. *Kirk v. Railway Co.*, 59 Minn. 161, 60 N. W. Rep. 1084, 50 Am. St. Rep. 397; *Schumacher*

v. Railway Co., 207 Ill. 199, 69 N. E. Rep. 825, *affirming* 108 Ill. App. 520; *Hipp v. Railway Co.*, 50 S. Car. 129, 27 S. E. Rep. 623.

27. *Roth v. Railroad*, 34 N. Y. 548; *Hedges v. Railroad*, 49 *id.* 223; *Lemke v. Railroad*, 39 Wis. 449; *Tallahassee Falls Mfg. Co. v. Railway Co.*, 128 Ala. 167, 29 So. Rep. 203, citing *Hutch. on Carr.*; *Railway Co. v. Nevill*, 60 Ark. 375, 30 S. W. Rep. 425, 28 L. R. A. 80, 46 Am. St. Rep. 208; *McMorrin v. Railway Co.*, 1 Ont. L. R. 561, 1 Canadian Ry. Cases 217; *Welch v. Railroad Co.*, 68 N. H. 206, 44 Atl. Rep. 304; *Berry v. Railroad Co.*, 44 W. Va. 538, 30 S. E. Rep. 143, 67 Am. St. Rep.

he lived in the vicinity of the warehouse.²⁸ In other words, the time within which the consignee is required to remove the goods will not be made to vary with his distance, convenience or necessities, but only such time will be allowed as would enable him, if living in the vicinity of the place of delivery, to remove them in the ordinary course and in the usual hours of business. He must, moreover, proceed to remove the goods with diligence after he is informed of their arrival, and must provide himself with ample means for doing so. In *Hedges v. The Railroad*,²⁹ goods arrived for the plaintiffs early in the morning. They received notice of the fact an hour or two later on the same day, and gave directions to their carman to go for and bring them from the depot. The carman brought away one load, but during the balance of the day carted for the plaintiffs to other places or remained idle. No other directions were given and no further effort was made to remove the goods. During the following night the goods were burned without the fault of the defendant. It was held that the loss must be borne by the plaintiffs, the defendant's relation to the goods having become changed before they were burned by the delay of the plaintiffs in removing them. "The plaintiffs seek to hold the defendant," say the court, "to a strict liability as insurer of the goods. Asking that so rigid a rule be applied to the defendant, it is just that the plaintiffs in turn be held to prompt and diligent action. A consignee cannot, after he has notice of the arrival for him of property, defer taking it away

781; *Burr v. Express Co.*, 71 N. J. L. 263, 58 Atl. Rep. 609.

28. *Moses v. Railroad*, 32 N. H. 523; *Wood v. Crocker*, 18 Wis. 345; *Leavenworth, etc., R. R. v. Maris*, 16 Kan. 333; *Derosia v. Railroad*, 18 Minn. 133; *Lemke v. Railroad Co.*, 39 Wis. 449; *Railway Co. v. Nevill*, 60 Ark. 375, 28 L. R. A. 80, 30 S. W. Rep. 425, 46 Am. St. Rep. 208, citing *Hutch. on Carr.*; *Berry v. Railroad Co.*, 44 W. Va. 538, 30 S. E. Rep. 143, 67 Am. St. Rep. 781, citing *Hutch.*

on Carr.; *Backhaus v. Railway Co.*, 92 Wis. 393, 66 N. W. Rep. 400.

Where the owner of the goods prefers to leave them in charge of the carrier until it suits his convenience to remove them, instead of acting promptly, the carrier will not be responsible for their loss if they are destroyed by a fire not caused by its negligence. *Stapleton v. Railway Co.*, 133 Mich. 187, 94 N. W. Rep. 739. 29. 49 N. Y. 223.

while he tends to his other affairs. He may not thus prolong the time during which the carrier shall remain liable as an insurer. That would be to make the carrier a mere convenience for the consignee, without consideration of any kind to the carrier, and yet resting under a great risk. So much time as the consignee, after notice, gives to his other business, to the neglect of taking charge of his property and removing it from the custody of the carrier, cannot be allowed to him in estimating what is a reasonable time for him in which, after notice of arrival, to take delivery of his goods. He is not to be compelled to leave all other business to take his goods from the hands of the carrier. He may attend first to whatsoever demand of his business he deems the most urgent or the most profitable; but he cannot do this at the hazard and expense of the carrier. It is the duty of the carrier to give notice of arrival; it is the duty of the consignee, at once, and with diligence, to act upon this notice, and to seek delivery and to continue until delivery is complete. Either may neglect this his duty, but then the consequence of the neglect must be borne by him."

Sec. 714. (§ 378.) Liability of carrier pending removal—Liable as warehouseman.—During this reasonable time the liability of the carrier remains unchanged; but so soon as it has elapsed he no longer stands in the relation of carrier to the goods, but in that of an ordinary bailee for hire.¹ Though an

1. *Tarbell v. Shipping Co.*, 110 44 W. Va. 538, 30 S. E. Rep. 143, N. Y. 170; *National, etc., Steamship Co. v. Smart*, 107 Penn. St. 492; *Kennedy v. Railroad Co.*, 74 Ala. 430; *Goold v. Chapin*, 20 N. Y. 259; *Alabama, etc., R. Co. v. Kidd*, 35 Ala. 209; *Liverpool, etc., Ins. Co. v. McNeill*, 89 Fed. 131, 32 C. C. A. 173; *Railroad Co. v. Berry*, 116 Ga. 19, 42 S. E. Rep. 371, citing *Hutch. on Carr.*; *Miller v. Railroad Co.*, 88 Ga. 563, 15 S. E. Rep. 316, 18 L. R. A. 323, 30 Am. St. Rep. 170, citing *Hutch. on Carr.*; *Berry v. Railroad Co.*, 44 W. Va. 538, 30 S. E. Rep. 143, 67 Am. St. Rep. 781; *Frank v. Railway Co.*, 57 Mo. App. 181.

A statute passed for the benefit and protection of property holders along a railroad's right of way, and in which the liability of the railroad for damage by fire is made absolute, does not cover goods of a consignee in its possession which have not been removed within a reasonable time. *Welch v. Railroad Co.*, 68 N. H. 206, 44 Atl. Rep. 304.

involuntary he is not a gratuitous bailee. He has the right to charge for the storage and keeping of the goods as warehouseman, for whatever length of time they may remain in his custody after the reasonable opportunity has been afforded to the owner to remove them, in addition to his compensation for their carriage.² The custody and protection of the goods, in his new character as warehouseman, is a distinct service from that of their transportation, which entitles him to additional compensation, in consideration for which he continues liable for their safe keeping as the hired bailee of the owner.³ As such bailee he is bound to take ordinary care of the goods, and if he suffers them to be damaged or lost, for want of such ordinary care, or by his failure to keep them in a safe and suitable place, or to store them properly, he will be liable.⁴

2. *White v. Humphrey*, 11 Q. B. 43; *Cairns v. Robins*, 8 M. & W. 258; *Schumacher v. Railway Co.*, 207 Ill. 199, 69 N. E. Rep. 823, *affirming* 108 Ill. App. 520.

3. *Cairns v. Robins*, *supra*; *Hardman v. Railroad Co.*, 83 Fed. 88, 27 C. C. A. 407, 39 L. R. A. 300, 48 U. S. App. 570.

4. *Tarbell v. Shipping Co.*, 110 N. Y. 170, and cases cited *supra*; *Aaronson v. Railroad Co.*, 52 N. Y. Supp. 95, 23 Misc. Rep. 666; *Walker v. Eikleberry*, 7 Okl. 599, 54 Pac. Rep. 553; *Railroad Co. v. Lannum*, 71 Ill. App. 84.

If a railroad fails to exercise a reasonable supervision over the storage of articles in its depot by third persons, and a drayman leaves a carboy of sulphuric acid there through which an explosion occurs, the railroad will be liable for the loss of goods held by it as warehouseman pending removal. *Farmers' Loan & Trust Co. v. Oregon Ry. & Nav. Co.*, 73 Fed. 1003.

A railroad company holding

property in its warehouse as a bailee for hire allowed a car marked "Powder," which was in fact empty, but locked, to be placed in close proximity thereto. The warehouse caught fire and the property was destroyed solely because the firemen were prevented, through reasonable fear of the powder car, from extinguishing the fire. The circuit court of appeals for the ninth circuit held the railroad company liable saying that the fire company acted, as it had the right to do, upon appearances, and that while it was not shown that the defendant actually put the powder label on the car, it had the control of the car and permitted it to remain so labelled on its track by the side of its warehouse and thus represented to every one that it did contain powder. *Hardman v. Railroad Co.*, 83 Fed. 88, 27 C. C. A. 407, 48 U. S. App. 570, 39 L. R. A. 300.

But the fact that the goods in a

If the consignee refuse to take the goods, the carrier will become bailee for the consignor or owner, whoever he may be, under the same terms as to liability.⁵ And when he has once become the bailee of the goods in the character of warehouseman, his liability in that character will continue as long as the goods remain in his custody.⁶

Sec. 715. (§ 378a.) Carrier must furnish reasonable opportunity and facilities for getting goods.—So the carrier must furnish to the consignee reasonable opportunities and facilities for procuring the goods which are to be delivered to him. This duty includes, of course, reasonable access to the depot, station or warehouse, and reasonable opportunity and facilities for getting away the goods.⁷ So if the consignee is bound to unload the goods himself from the car, it is the duty of the carrier to place the car where it can be unloaded with a reasonable degree of convenience,⁸ and to furnish the consignee with safe and proper facilities for the purpose.⁹ And if the goods consist of live stock, such as cattle, it is the duty of the carrier to provide inclosed lots or yards in or through which the stock may be delivered to the consignee.¹⁰

warehouse are damaged by a flood of extraordinary extent and rapidity of rise does not show that the carrier who stored them there was guilty of want of reasonable and ordinary care. *Gregg v. Railroad Co.*, 147 Ill. 550, 35 N. E. Rep. 343, 37 Am. St. Rep. 238.

Where the carrier has no depot or warehouse at the place of destination for the storage of such freight as corn, it may be warehoused in the cars on the side tracks. *Gratiot, etc., Co. v. Railroad Co.*, — Ill. —, 77 N. E. Rep. 675.

5. *Weed v. Barney*, 45 N. Y. 344.

6. *Brown v. Railway*, 54 N. H. 535; *Cairns v. Robins*, 8 M. & W. 258; *Mitchell v. Railway Co.*, 10 L. R. Q. B. 256.

7. *Independence Mills Co. v.*

Railway Co., 72 Iowa, 535; *East Tennessee R. Co. v. Hunt*, 15 Lea, 261.

8. *Independence Mills Co. v. Railway Co.*, *supra*.

It is a question for the jury in the light of the surrounding circumstances whether or not when the car has been placed in a position to be unloaded the consignee has the right to presume that the car has been delivered to him. *Brown v. Railroad*, 133 Mich. 371, 94 N. W. Rep. 1050.

9. *Frasier v. Railway Co.*, — S. Car. —, 52 S. E. Rep. 964.

10. *Reynolds v. Railway Co.*, — Wash. —, 82 Pac. Rep. 161, citing *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73.

IV. DELIVERY BY EXPRESS COMPANIES.

Sec. 716. (§ 379.) Express companies required to make personal delivery.—Express companies may be said to owe their origin to this modification of the law in regard to the delivery of goods in favor of water carriers and railway companies. Depositing in warehouses, whether with or without notice to the consignee or owner, with the requirement that he should call for them, was found to be unsuitable for the carriage of small and valuable parcels, as well as troublesome to the consignee. To avoid this inconvenience, as well as to secure greater safety and dispatch in the transportation and delivery of valuable packages, carriers who undertook to make delivery to the consignee personally, although their lines of travel might be identical with those of the water carrier and the railroad carrier, and even though they might employ the vehicles of these carriers to effect the transportation, became necessary. This necessity was supplied by what are known in this country as express companies, which undertake to carry goods of that class, and to make a personal delivery of them to the consignee; and to this public profession they are held by the law with great strictness.¹¹

Sec. 717. Personal delivery excused at small stations—Establishment of limits in a city beyond which company will

11. *Baldwin v. American Express Co.*, 23 Ill. 197; *American Union Express Co. v. Wolf*, 79 *id.* 430; *American U. Express Co. v. Schier*, 55 *id.* 140; *Marshall v. American Express Co.*, 7 Wis. 1; *Sullivan v. Thompson*, 99 Mass. 259; *Packard v. Earle*, 113 *id.* 280; *Witbeck v. Holland*, 45 N. Y. 13; 55 Barb. 443; *Southern Express Co. v. Armstead*, 50 Ala. 350; *American Express Co. v. Robinson*, 72 Penn. St. 274; *Union Exp. Co. v. Ohleman*, 92 Penn. St. 323; *Bennett v. Express Co.*, 12
- Oreg. 49; *Bullard v. Express Co.*, 107 Mich. 695, 65 N. W. Rep. 551, citing *Hutchinson on Carr.*
- In Indiana, this duty of express companies to make personal delivery is made obligatory by statute under compulsion of a penalty. That the statute is not invalid as an attempt to regulate interstate commerce, and that it is not complied with by a personal delivery to the consignee at the local office, see *United States Express Co. v. State*, 164 Ind. 196, 73 N. E. Rep. 101.

not go to make delivery.—Their right, however, to dispense with the requirement of a delivery to the consignee personally, and to change the character in which they hold the goods from that of carriers to warehousemen, by giving notice to the consignee, and allowing reasonable time to call for them, at unimportant way-stations of the railways upon which they transport goods, has been recognized in some of the cases. But it is said that this privilege will be confined to the delivery of goods by them at places at which their business is so small as not to justify the employment of messengers or delivery agents or wagons, that it must be in conformity with a usage in reference to which it must be supposed the parties contracted, and that prompt notice must be given.¹²

So it is held that an express company may, so long as the public have notice of the custom, and so long as the company acts in good faith and with regard to the public requirements, establish limits in a city beyond which its agents cannot be required to go to make delivery; and a person dealing with the company with knowledge that such limits exist cannot compel the company to go beyond them to make a delivery to him.¹³

Sec. 718. (§ 381.) How far usage may affect duty.—Whether the usage and custom of such companies can be relied upon

12. *Baldwin v. Express Co., supra*; *American Express Co. v. Schier, supra*; *Gulliver v. Adams Express Co.*, 38 Ill. 503; *Haslam v. Adams Express Co.*, 6 Bosw. 235; *Express Co. v. Holland*, 109 Ala. 362, 19 So. Rep. 66, citing *Hutch. on Carr.* in a small village when a postal card notice is sent out on Saturday afternoon and no one calls for the package by 7:30 p. m. on the following Monday. *Laporte v. Express Co.*, 48 N. Y. Supp. 292, 23 App. Div. 267.

Where the goods have arrived and notice has been given, but the consignee neglects to take the same within a reasonable time, the express company will not be liable where the goods have been stolen without its fault. *Express Co. v. Holland, supra*. In a country village the same degree of security, either as to fire or burglary, cannot be required of an express company when acting as a warehouseman, as in larger cities, where greater facilities for warehousing exist. *Laporte v. Express Co., supra*.

13. *Bullard v. Express Co.*, 107 Mich. 695, 65 N. W. Rep. 551.

A reasonable opportunity is given

by them as an excuse for omitting a delivery personally to the consignee, under particular circumstances and in certain cases, to the same extent as, by other carriers, is not well settled. The cases show that the courts are somewhat adverse to making exceptions in their favor as to this duty upon that ground, though they have been sometimes allowed to rely upon it. Where delivery was made to the clerk of a government bakery of an ordinary package, consigned to one of the employees, by an express company, it was held that the carrier was justified by the usage and custom in such cases in making the delivery in this manner. But it was afterwards decided by the same court that a delivery by such a carrier to a station agent or switchman of the railroad at a way-station, where the amount of business done by the carrier was very small, and where no messenger had ever been employed by it, could not be defended upon the ground of the usage of the company, and of all other express carriers, so to deliver the goods and notify the consignee. It was said that such usage was local in its application and character, and confined to this station, and that unless it was shown that the plaintiff knew of the custom when he made the contract, he could not be held bound by it; and the latter case was held to be clearly distinguishable from the former.¹⁴ And where an express carrier put off a package upon the platform of a station at which it had no messenger or agent, and no warehouse, and only carried the package at the solicitation of the plaintiff's agent, who knew these facts, to a consignee who had before received goods, delivered at the same station in the same manner, it was held that it could not rely upon usage as a defense, when sued for the loss of the package.

Sec. 719. (§ 382.) Same subject.—It has been held that a custom of an express carrier to deliver to the president of a college, packages sent to the students, might be relied upon as a justification of such a delivery in a suit for a loss.¹⁵ And a usage in delivering packages to a bank after banking hours

14. *Sullivan v. Thompson*, 99 Mass. 259; *Packard v. Earle*, 113 Mass. 280.

15. *Southern Express Co. v. Everett*, 37 Ga. 688.
In *Aldrich Car Seal Mfg. Co. v.*

has also been considered available for the defense of the express company when it was sued for the loss of the packages, after its tender and refusal, because not offered within such hours and in the absence of the cashier of the bank, because, it was said, if it had been the habit of the bank to receive such packages from the carrier on its arrival, it was very proper for the jury to consider it in reference to the question whether the package was tendered at a reasonable time.¹⁶ But where the express carrier undertook to deliver a heavy box for the plaintiff, who lived in the fourth story of a building, by placing it within the outside door of the building at the foot of the stairs, and notifying a boy whom he found in the office, the

Express Co., 117 Mich. 32, 75 N. W. Rep. 94, the plaintiff, desiring to submit bids for furnishing car seals to the United States government, inclosed its bid with samples of the seals addressed, "Hon. J. G. Carlisle, Secretary United States Treas. Dept., Washington, D. C.," and delivered the package to the defendant express company to deliver at the treasury department before 2 p. m. July 1st. The package arrived at Washington July 1st, and was delivered by the express company's driver at 1:25 p. m. July 1st to one C. E. Vickery, an employe in the treasury department who had charge of all the store supplies in the treasury department, and a receipt was taken therefor. The package did not reach the department of the treasury where those bids would be received until 3:07 p. m. In an action by the plaintiff against the express company for alleged failure to deliver the package at the United States treasury department before 2 p. m. July 1st, the question of the sufficiency of the delivery arose. The court in its

opinion said: "There was no request or direction on the part of the plaintiff to deliver the package directly to the secretary of the treasury, or to any one of its numerous departments. It is conclusively proven that it was delivered at the treasury department at the customary place for such packages to be delivered, in the absence of express directions to the contrary, three quarters of an hour before the time that the bids were to be opened and examined. If there was any fault anywhere it was attributable to the treasury department at Washington. . . . The company discharged its full duty in delivering the package at the usual place in the treasury department. It did not agree or assume to deliver it to the appointment division which had charge of these contracts and bids or to the secretary in person." A verdict directed for the defendant was sustained.

16. *Marshall v. The American Express Co.*, 7 Wis. 1. See also, *Stimson v. Jackson*, 58 N. H. 138.

plaintiff not being in, and attempted to justify such delivery, when sued for its loss, upon the ground of usage, his defense was held to be unavailable, especially as the usage was not conclusively proven, and it was said that the law was exceedingly jealous of any innovation upon the responsibility of carriers, and that the express business, most of all, required that even the most uniform and constant dereliction of duty, however successful, should not enable express carriers to evade liability for a lost package committed to their care, by getting up a usage.¹⁷

V. VARIOUS INCIDENTS OF DELIVERY.

Sec. 720. (§ 383.) Whether carrier bound to make a personal delivery, must give notice of a refusal of the goods by the consignee.—It has been frequently determined that if the express carrier tender the goods to the consignee, and they are refused, the carrier will from that time hold them in the character of warehouseman; and if he store them safely with some third person, it would seem that his liability is completely at an end. Whether, in the case of such refusal, and warehousing, it becomes his further duty to notify the consignor, is a question upon which the cases are in conflict. It has been said that there is no rule of law which requires the carrier to give such notice in ordinary cases; that the liability for a failure to give it could only arise where such failure would be evidence of gross negligence in discharge of the duty to protect the property in his custody, and that the fact that the property was liable to depreciate in value by the fluctuation of the market price will not take the case out of the general rule. This was held in a case the facts of which were, that the express carrier had carried the goods to destination, and, having offered them to the consignee, who refused to pay for and take them, had stored them, without giving notice to the consignor. They remained in store for nearly a month, during which time, as was claimed by the consignor, he was ignorant of the fact that

17. *Haslam v. Adams Express Co.*, 6 Bosw. 235.

they had been refused, and the goods depreciated greatly in market value. This being the view taken of the law upon the subject, it was held that the plaintiff could not recover;¹⁸ and the decision in this case, upon the question of the obligation of the carrier to give notice to the consignor, under such circumstances, seems to be supported by a number of cases.¹⁹

Sec. 721. (§ 384.) Same subject—Who to be deemed the owner.—But the better opinion would seem to be that the carrier would be bound to presume, from such refusal, that the consignor was still the owner of the goods, and that, to relieve himself from his responsibility as carrier, it would be necessary for him to store them, either in his own warehouse or with some responsible warehouseman, and give notice of the fact to such consignor or owner. If, however, the consignee be the owner, the notice of the storing of the goods, if they are not retained by the carrier in his own warehouse, should be given to him, so that he may know where to call for them if he should so wish.²⁰ Accordingly, where goods were intrusted to an express carrier, with instructions to collect the price of them upon delivery, it was held to be liable for their loss by depreciation in value, the goods having been kept by the carrier at the place of destination, without notice to the consignor, for nearly a month after they had been tendered to the consignee, and not taken by him, because he was not then prepared to pay

18. *Bremer v. The Southern Express Co.*, 6 Cold. 356.

19. *Mayell v. Potter*, 2 Johns. Cas. 371; *Fisk v. Newton*, 1 Denio, 45; *Fenner v. Railroad*, 44 N. Y. 505; *Zinn v. Steamboat Co.*, 49 *id.* 442; *Neal v. Railroad*, 8 Jones (Law), 482.

20. *The Eddy*, 5 Wall. 481; *The Green, etc., Nav. Co. v. Marshall*, 48 Ind. 596.

The ordinary duty of a carrier when the consignee refuses to receive the goods shipped is to store them either in his own warehouse or that of some responsible third

party, notify the shipper or owner of such refusal, and hold them for a reasonable time subject to further orders. But if the shipper be the owner and consignee, no such duty is imposed on the carrier. The refusal of the owner to accept the goods under such circumstances constitutes an abandonment of the goods, and the owner will thereafter be estopped from asserting that the carrier has converted them. *Beedy v. Pacey*, 22 Wash. 94, 60 Pac. Rep. 56.

for them, although he had several times promised to call and pay for them.²¹ But the carrier will not be required to give notice to the consignor that the consignee refuses to accept the goods where such notice has been given by the consignee.²²

Sec. 722. (§ 385.) Same subject—How when goods are not to be delivered until paid for.—But it has been held that if the carrier is instructed not to deliver the goods until they are paid for, and the consignee, instead of refusing to take them, promises to pay for and take them within a few days, and requests the carrier to keep them for him until he is ready to pay for them, the carrier becomes a warehouseman of the goods; and if they are destroyed while so held, without any fault or negligence of his, he will not be liable, although he has given no notice of the fact to the consignor. The custom of carriers, however, in San Francisco, which was the place of delivery, in extending the time for the reception of goods, and the distance and the length of time which would have been required to communicate notice to the consignor, who resided in the city of New York, were considered as having an important bearing in the case.²³

Sec. 723. (§ 386.) Same subject—How when consignee absent or not found.—The effect will be the same upon the liability of the carrier if the consignee be absent, or after reasonable diligence cannot be found. It is the duty of the consignee to be on hand and ready to receive the goods. He cannot absent himself, and thus put it out of the power of the carrier to make a delivery to him, and hold him during his absence to the extraordinary care of the goods required of the carrier. If, therefore, he be absent when the carrier is ready to deliver

21. *American, etc., Express Co. v. Wolf*, 79 Ill. 430. See also, *Express Co. v. Wettstein*, 28 Ill. App. 96.

In no event, however, can the carrier be held liable for conversion because he delays an unreasonable time in giving notice of the refusal of the consignee to

receive the goods. *Fishman v. Platt*, 90 N. Y. Supp. 354.

22. *Manhattan Rubber Shoe Co. v. Railroad Co.*, 41 N. Y. Supp. 83, 9 App. Div. 172.

23. *Weed v. Barney*, 45 N. Y. 344. See also, *Levy v. Weir*, 77 N. Y. Supp. 917, 38 Misc. Rep. 361.

the goods, and has left no agent known to the carrier to whom delivery can be made for him, or to whom notice can be given of their arrival, the carrier becomes at once a mere warehouseman of the goods.²⁴

Sec. 724. (§ 387.) Same subject.—In such cases, as well as when the consignee has refused to take the goods, if the carrier know that they still belong to the consignor, from being so informed or from any circumstance which should bring the fact to his knowledge, as, for instance, if he is instructed not to deliver the goods until the price is paid, or other terms complied with, he should, upon being unable to find the consignee, after reasonable efforts to do so, or upon ascertaining his absence, give notice to the consignor or other owner, if he is known. The carrier, however, has always the right to presume that the goods belong to the consignee unless he is otherwise informed, or is bound to infer otherwise from the circumstances. And if, in the absence of such information or circumstances, he store the goods for the absent or unknown consignee, without notice to the consignor, it would seem that he ought not to be held liable for any loss which may arise from its not being given. For any delivery which discharges the carrier, as between himself and the consignee, is good as against the consignor, unless the carrier is advised that the goods still belong to the latter.²⁵

Sec. 725. (§ 388.) Same subject—Duty arises only when bound to make personal delivery or to give notice of arrival.—The duty to give notice to the consignor or owner of the goods, in case of their refusal by the consignee, or when he is absent or cannot be found, can arise only when the carrier is required to make a personal delivery or to give notice to the consignee of their arrival. It has no application, therefore, to railroad

24. *Adams Express Co. v. Darnell*, 31 Ind. 20; *Marshall v. Am. Ex. Co.*, 7 Wis. 1; *Clendaniel v. Tuckerman*, 17 Barb. 184; *Roth v. Railroad*, 34 N. Y. 548; *Alabama, etc., R. R. v. Kidd*, 35 Ala. 209; *Freeman v. Railroad Co.*, — Mo. App. —, 93 S. W. Rep. 302, citing *Hutch. on Carr.*
25. *Sweet v. Barney*, 23 N. Y. 335.

companies, when they are only required to deposit the goods in their warehouses to await the call of the consignee, without notice to him, which, as we have seen, is all that is generally required of such companies. Their whole duty as carriers is performed as soon as this is done, and the failure as warehousemen to give such notice would not be such negligence as to make them liable in that character for any loss which might be thereby occasioned.²⁶ It is also said that when the duty devolves upon the carrier to give such notice to the consignor, and the attempt is made to hold him liable for the failure to perform it, it must appear, before he will be made liable, that the loss for which the claim is made upon him was the consequence of his omission to give the notice. If the loss be attributable to a cause which had no connection with notice to the owner and which such notice would not have prevented, it is evident that the carrier should not be held liable for his failure to give it.²⁷

Sec. 726. (§ 389.) The duty of the carrier as to C. O. D. goods.—Goods are frequently sent, especially by the express carrier, with instructions not to deliver them until they are paid for.²⁸ In such cases, it is understood that the payment of

26. Merchants', etc., Co. v. Hallock, 64 Ill. 284.

27. Weed v. Barney, 45 N. Y. 344.

28. Goods accompanied with such instructions to the carrier have obtained the name, in commercial parlance, of C. O. D. goods, or are said to be sent C. O. D., because they are usually marked with those letters. They mean simply "collect on delivery," and the acceptance of goods thus marked by the carrier generally imports an undertaking on his part that he will not deliver to the consignee until the collection is made. The meaning of the letters, when they are indorsed upon

packages, and the attempt is made to hold the carrier as upon a contract growing out of such a symbolic mark, must be explained by evidence. Courts will not take judicial notice of their meaning. In the case of *The American Express Co. v. Lesem*, 39 Ill. 312, the following remarks were made by Breese, J., upon their meaning and effect: "It is proper here to discuss the nature and import of the letters C. O. D., as placed on the receipt and on the box by the express company. Do they amount to a contract? And, if so, what is the extent of it? What are the liabilities assumed by the company, and how can they dis-

the price and the delivery of the goods are to be concurrent acts. The carrier who accepts the goods with such instructions undertakes that they shall not be delivered unless the condition of payment be complied with, and becomes the agent of the shipper of the goods to receive such payment. He therefore undertakes, in addition to his duties as carrier, to collect for the consignor the price of his goods.²⁹ This no carrier can be compelled to do unless it be a customary part of his business, or unless he has, in some way, held himself out to the public as willing to undertake such service; and then, upon the principle that every man who engages in a public employment shall be required to act in that employment according to his public professions, he might be obliged to accept goods upon such terms from all who offered them.

Sec. 727. (§ 390.) Same subject—Must conform to instructions—Wrongful delivery ratified.—However this may be, when the goods are so received, the carrier is held to a strict compliance with such instructions, and if the goods are delivered without an exaction from the consignee of the amount which the carrier is instructed to collect, he becomes liable to

charge them? These are interesting questions to the whole business community, and deserve careful and full investigation, the more especially after the effort made by this company to deprive them of any force or meaning. The counsel treats them as an enigma not legally explainable. We are inclined to think that if an express company or other common carrier resort to enigmas in the conduct of their business, they shall not alone be permitted to afford the solutions. Their agent testifies that the letters mean that the express company was to collect of the consignees, on delivery, the amount due from him and marked on the package, and to return such amount to the con-

signors; and this is the experience of the whole business community employing such an agency. The letters are the initials, and so understood, of the words 'collect on delivery;' and this undertaking by those letters the appellants assumed, and they must be held to a strict performance thereof."

29. In *United States Exp. Co. v. Keefer*, 59 Ind. 263, it is said: "Where the goods are marked 'C. O. D.,' the contract of the common carrier, in connection therewith, is not only for the safe carriage and delivery of the goods to the consignee, but he further contracts with the consignor that he will 'collect on delivery' and return to the consignor the charges on said goods."

the consignor for it. Delivery under such circumstances, without requiring such payment, has been said to be as much a conversion, though to the right person, as if it had been made to the wrong person.³⁰ It is the surrender by the carrier of a security for the debt, not only without authority, but contrary to the instructions of the consignor and his own contract.³¹ The wrongful delivery may, however, be ratified by the consignor, and if ratified the carrier will be released.³²

Sec. 728. (§ 391.) Same subject—Duty to require payment is based on contract.—The obligation to require payment for the goods, as a condition of their delivery, does not arise from the implied duty of the carrier. It must rest upon contract, either express or implied from the circumstances.³³ No doubt, if goods, so marked as to clearly indicate that it was the intention of the consignor that they should not be delivered without payment of their price, be delivered to a carrier who had made such collections a part of his customary business, and especially if he had been in the habit of carrying goods for the same consignor upon the same terms, it would be held as obligatory upon him to deliver only when such payment was made.³⁴ And such contract may be verbal, and need not be incorporated in the carrier's receipt.³⁵ But if goods so marked be delivered to a carrier who never undertook to carry and deliver upon such terms, no contract to do so in the particular instance would arise or be implied. This was decided where a box, so marked, was sent by a railroad company as carrier, and it was shown that, although the road accepted the box, it had not only not been its custom to collect from the consignee, but that it had never done so. And although the box so

30. *Murray v. Warner*, 55 N. H. 546.

31. *Meyer v. Lemcke*, 31 Ind. 208; *Feiber v. District Tel. Co.*, 3 N. Y. Suppl. 116.

32. *Rathbun v. Steamboat Co.*, 76 N. Y. 376. In this case the carrier took a check in payment, but the check was accepted by the consignor, who sent it on for

collection. The taking of the check was held ratified by such acceptance.

33. *Fowler v. Railway Co.*, 98 Mo. App. 210, 71 S. W. Rep. 1077, citing *Hutch. on Carr.*

34. *American Express Co. v. Lesem*, 39 Ill. 312.

35. *The Union, etc., R. R. v. Riegel*, 73 Penn. St. 72.

marked was directed to the care of the consignee, and was delivered by the company directly to the latter, upon his calling for it, without collecting the charges marked upon it, the road was held not liable for the loss by this failure to pay the consignor his charges.³⁶ So where a package was delivered to the carrier, with an accompanying bill upon which was indorsed the words "please collect," it was held that they amounted only to a request to the carrier, and that his acceptance of them did not create a contract not to deliver unless the price was paid.

Sec. 729. (§ 392.) Same subject—Duty to give consignee an opportunity to pay.—When the carrier receives goods with such instructions, and carries them to their destination, if the consignee is not ready to pay for them immediately upon their being tendered to him, he must retain them a reasonable time to enable the consignee to obtain the means to do so. And if the carrier return them immediately upon a tender of them to the consignee, who declines to pay for and take them, because he is not then prepared to do so, but desires to be allowed a reasonable time in which to prepare himself to call for them, he will be liable to an action for damages by the consignee. And this will be so whether the charges demanded are for freight upon the goods or for their price.³⁷ Though after such tender, no matter for what reason the consignee defers such

36. *Chicago, etc., R. R. v. Merrill*, 48 Ill. 425. In this case, as well as in those previously cited in reference to instructions to collect on delivery, the box was marked "C. O. D.," the well-understood abbreviation, and meaning of course the same thing as the words in full.

In *Smith v. Express Co.*, 104 Ala. 387, 16 So. Rep. 62, instructions were written on a small piece of paper (name of consignee, "C. O. D.," "\$86.75"). The package and note of instructions was delivered to the carrier by plain-

tiff's servant, who took a receipt in turn. The receipt nowhere showed the mark "C. O. D." The servant took the receipt home and laid it away. Before the plaintiff saw it, the package had been delivered. The court held that the sender was charged with notice of the contents of the receipt, and the giving and receiving of such receipt operated as a refusal by the carrier to send the goods C. O. D.

37. *The Great Western Ry. v. Crouch*, 3 H. & N. 183.

payment and acceptance, the carrier will hold the goods in the character of warehouseman.³⁸ Nor is a carrier who is bound to make a personal delivery required to offer the goods more than once, no matter what may be the excuse for not taking them.³⁹ But if the consignee peremptorily refuse them, the carrier would of course be justified in returning them immediately to the consignor. He is not under any obligation to do so, however, in any event, until he is so instructed. He may give notice to the consignor of their refusal, and await his instructions in regard to them.⁴⁰

Sec. 730. (392a.) Same subject—Right to recover goods delivered without payment.—Where goods have been sent forward upon the condition that they shall be paid for upon delivery, and they are procured by the consignee without payment, either through the artifice of the consignee or the negligence of the carrier, they may undoubtedly be recovered by the consignor or by the carrier acting promptly and before the rights of a *bona fide* holder have intervened; but where, by the negligence of the carrier, goods contracted to be sold to the consignee upon payment on delivery have been delivered to the consignee without payment and he has sold them to one who purchased them in good faith for value and without notice, neither the consignor nor the carrier can recover them from such *bona fide* purchaser.⁴¹

Sec. 731. (§ 392b.) Same subject—Liability of carrier for return of money.—It would appear from the authorities, though the question seems never to have been directly decided, that when the money is received for the goods, which have been

38. *Hasse v. Express Co.*, 94 Mich. 133, 53 N. W. Rep. 918, 34 Am. St. Rep. 328, citing *Hutch. on Carr.*

39. *Storr v. Crowley, McClel. & Y.* 129; *Marshall v. The American Exp. Co.*, 7 Wis. 1.

40. See *Adams Exp. Co. v. McConnell*, 27 Kan. 238; *Railway Co. v. Heilprin*, 95 Ill. App. 402, citing *Hutch. on Carr.*

If the consignee refuses to accept the goods, and the shipper on notice thereof directs the carrier to hold them until called for, the carrier is liable to the consignor only as a warehouseman. *Byrne v. Fargo*, 73 N. Y. Supp. 943, 36 Misc. 543.

41. *Norfolk, etc., Railroad Co. v. Barnes*, 104 N. C. 25.

sent with the understanding that the carrier is to collect for them and bring back the money, he becomes responsible for its return to the consignor as a common carrier as soon as he has received it, whether he receives any distinct compensation for carrying it or not.⁴²

42. *Kemp v. Coughtry*, 11 Johns. 107, was a case in which the carrier was directed to sell the goods and bring back the money. In this case it was said that "it can make no difference whether the return cargo is in money or goods. A person may be a common carrier of money as well as of other property. Although no commission or distinct compensation was to be received upon the money, yet, according to the evidence, it appears to be a part of the duty attached to the employment, and in the usual and ordinary course of the business when the cargo is sold for cash. The freight of the cargo is compensation for the whole; it is one entire concern." So where the contract of the carrier is that persons sending grain over the route are to have the empty bags returned without charge for freight, it is not to be deemed a gratuitous bailment of the empty bags, so as to exempt the carrier from liability for their loss. The consideration paid for the carriage of the full bags will be considered as compensation, both for the transportation of the full bags and the return of the empty ones. *Pierce v. The Milwaukee, etc., R. R.*, 23 Wis. 387. That empty packages are returned free of charge is one of the inducements held out to the public to send full packages by the carrier. *Aldridge v. The Railway*

Company, 15 Com. B. (N. S.) 582. In both these cases the carriers were held liable as such for the loss of the empties whilst being returned by them.

The principle upon which *Kemp v. Coughtry* was decided was approved in *Harrington v. McShane*, 2 Watts, 443; *Taylor v. Wells*, 3 *id.* 65, and *Emery v. Hersey*, 4 Greenl. 407. In the first-named case the owners of a steamboat, which ran upon the Ohio river, took produce to be carried and sold by them for a certain freight, and were bringing back in the same vessel the money for which it had sold, when the vessel and money were accidentally destroyed by fire, which was exactly the same case as *Kemp v. Coughtry*, except that in the latter case the money was lost by robbery. The owners of the boat were held liable for the money as carriers. "The question of the defendants' responsibility in the present case," said Sergeant, J., "depends on the character in which they held this money when the loss occurred. If they were merely factors they are not responsible; if they were mere carriers the reverse must be the case. Had the flour been lost on the descending voyage by a similar accident there could be no doubt whatever of the defendants' liability; they were certainly transporting it in the character of carriers. On their arrival at the

Sec. 732. In the absence of express authority agent of carrier cannot guaranty price of goods.—In the case of the agent of a railroad company it has been held that he has no authority to guaranty the payment to the shipper of the price of the goods shipped, and the railroad company, in the absence of any express authority to its agent to enter into such a promise, is not liable on the agent's undertaking. Whether or not the

port of destination and landing the flour there, this character ceased and the duty of factor commenced. When the flour was sold and the specific money, the proceeds of the sale, separated from other moneys in the defendants' hands and set apart for the plaintiffs, was on its return to them by the same boat, the character of carrier re-attached." The other cases cited were substantially the same and were decided in the same way.

The question as to the character in which the carrier holds the money which he has collected on C. O. D. consignments, in the performance of his duty to return it to the former owner of the goods, has several times arisen in courts of admiralty, in proceedings to enforce its collection as a maritime lien upon the vessel, and the claim has been allowed, which could have been done only upon the ground that the money was held by the owners of the vessel for return to the owner in the character of carriers. This was the opinion of Hill, J., in *Zollinger v. The Steamer Emma*, reported in Vol. III, Central Law Journal, p. 285. This question in the case was disposed of by him in the following language:

"The next and last exception offered by the mortgagee is as to

the liability of the vessel *in rem* upon what are styled C. O. D. bills, that is, where the master of the vessel contracted to deliver goods to the consignees to whom they had been sold, and collect and bring back the price thereof to the shipper. There can be no doubt of the liability of the vessel for the safe transportation and delivery of the goods upon these contracts. The more difficult question is as to the liability of the vessel for the failure of the master to return the money received to the shipper. It is, I believe, a settled rule, that where a cargo of goods is delivered to a vessel upon a contract that the master shall convey them to some market, and there sell them for account of owner, until he makes a sale and delivers the goods he is acting as the master of the vessel, and not as the agent of the shipper; but that after he sells and receives the money, he is agent of the shipper, and consequently that for any breach of contract of affreightment the vessel is liable, but for any default in payment of the money to the shipper the master is personally liable only.

"But there is a marked distinction between such a case and one in which the consignor has already sold the goods to the con-

company would be liable if it received some of the benefits and profits of the transaction was not determined.¹

Sec. 733. (§ 393.) The consignee's right to inspect the goods.—The consignee is entitled to an opportunity to inspect the goods, and this opportunity the carrier is bound to afford him, even though he may have instructions not to deliver them until they are paid for.² The carrier may even permit the consignee, upon depositing with him the charges upon the goods, to take them away, with the understanding that, in case they do not answer to the quality of the goods ordered by him, he may return them and take back his money. This was the case where the consignee had ordered a coat of a certain description and paid the price to the carrier, upon condition that if upon examination it should prove unsatisfactory he might return it and receive back his money. In an action against the carrier by the consignor, it was held that the carrier had done only what by law he was required to do, in giving the consignee an opportunity to examine the coat, and that therefore he was not liable.³ So, if the consignor attempt to practice a fraud upon the consignee, the carrier may return him his money, even without any agreement or understanding that he

signee upon an agreement that money is to be paid upon delivery of the goods. In such case the contract is entirely one of af-freightment. The master contracts for a certain sum to be paid as freight to transport the goods to the consignee and transport the money delivered to him by the consignee back to the consignor, or, if the money is not placed upon the vessel by the consignee, to re-transport the goods themselves to the shipper. The duties assumed are entirely those of a common carrier, and a common carrier is as much liable for a failure to transport and deliver money received by him for transportation as he is for a failure to

deliver any other character of freight.

"The immense commercial business now transacted in this way can only be protected by this rule, which can be applied without infringing upon any established principle of admiralty, and is fully sustained in the case of *The Hardy*, decided by Judge Nelson, 1 Dill. 460. The claims so far as proved must therefore be allowed as liens upon the vessel."

1. *Weikle v. Railway Co.*, 64 Minn. 296, 66 N. W. Rep. 963.

2. *Brand v. Weir*, 57 N. Y. Supp. 731, 27 Misc. 212, citing *Hutch. on Carr.*; *Sloan v. Railway Co.*, 126 N. Car. 487, 36 S. E. Rep. 21.

3. *Lyons v. Hill*, 46 N. H. 49.

shall do so. As where the consignee was induced by fraudulent representations that he had become the lucky drawer of valuable prizes in a lottery to order them to be sent to him, and a package was accordingly sent to him, with instructions to the carrier to collect a certain amount of money from him before delivery, on the pretense that this was the amount of discount to which the lottery was entitled, and when the package was opened it was found to contain nothing but waste paper, it was held that the carrier was right in returning him his money.⁴

Sec. 734. Same subject—Consignee's right to return damaged goods.—By demanding or requesting payment for goods sent C. O. D., the carrier affirms by implication that he has no notice of facts which exonerate the consignee from receiving the goods or making payment for them. But if the carrier has knowledge that the goods have been damaged in transit, and he fails to inform the consignee of that fact, the consignee will be entitled to return the goods to the carrier within a reasonable time after the discovery of such damage and recover back what he has paid; and what will be considered a reasonable time will be a question for the jury. The carrier, however, will have the right to be reinstated in his lien, but he cannot escape repayment to the consignee on the ground that he has paid the money over to the consignor, unless it appear that notice of the damage was not given him within a reasonable time.⁵

Sec. 735. (§ 394.) The consignee's right to change the place of delivery—Consignee presumed to be the owner.—It has been shown in the last chapter⁶ that the owner of the goods may at any time change his instructions to the carrier as to their destination, and may, if he chooses, countermand his previous orders in regard to them; and this he may do at any time during the transit. But the consignee is the presumptive owner, and unless the carrier is advised that the consignor has

4. *Herrick v. Gallagher*, 60 Mass. 328, 65 N. E. Rep. 375, 59 Barb. 566. L. R. A. 731.

5. *Hardy v. Express Co.*, 182 6. *Ante*, § 660.

not parted with his title, and that it is to vest in the consignee only upon the performance of certain conditions, as, for instance, the payment of their price, a delivery at any place appointed by the consignee will discharge the carrier from his liability, even though it should not be the place appointed by the consignor. Thus, the plaintiff having sold wheat by sample, to be delivered to the purchaser at his mill, sent it by the defendants' railway. On the arrival of the wheat at a station, two miles from the mill, the defendants kept it there under instructions given to them by the consignee that wheat arriving for him at that station should not be forwarded to the mill without his written order. The consignee examined the wheat at the station, but refused to accept it, and while it remained there it became deteriorated in quality and value. It was held that the consignor could not recover the loss from the defendants, as the non-delivery was by order of the consignee.⁷

Sec. 736. (§ 395.) Same subject—Consignee cannot change destination when known to be mere agent.—But where the carrier is informed that the goods belong to another, and that the consignee is merely his agent, he will be liable to such owner

7. *The London etc. Railway v. Bartlett* 7 H. & N. 400.

Pollock, C. B. said in substance: "It is, I think, quite clear that the consignee of goods may receive the goods at any stage of the journey; and I think that, if the consignor directs the goods to be delivered at a particular place, it is no contract to deliver the goods at that place and not elsewhere. The contract is to deliver the goods there, unless the consignee shall require them to be delivered at some other place." Bramwell, B.: "I think it would probably create a laugh anywhere except in a court of law if it was said that a carrier could not deliver to the consignee short of the particular place specified by the con-

signor. The goods are intended to reach the consignee, and provided they reach him to his satisfaction it is immaterial where that place may be, and the consignor cares very little whether it be at one place or another. The obvious meaning of the contract is to deliver to the consignee at the place mentioned, unless the consignee chooses, and the carrier is willing, that they should be delivered somewhere else."

See also, *Railway Co. v. Frankel Bros.*, (Can.) 33 S. C. R. 115, 2 Canadian Ry. Cases, 155; *Express Co. v. Williams*, 99 Ga. 482, 27 S. E. Rep. 743, citing *Hutchon Carr.*; *Tebbs v. Railway Co.*, 20 Ind. App. 192, 50 N. E. 486.

if, after the goods are once delivered to him for shipment, consigned to the agent at a particular destination, he permits such agent to take back the goods or delivers them to another upon his order at the place of shipment, or at any other place than the one to which they are consigned. This was the question and it was so decided in the case of *The Southern Express Company v. Dickson*.⁸ There the agent of the plaintiff had delivered the goods to the company to be carried, consigned to himself at destination, at the same time informing the company's agents that they belonged to the plaintiff, and that he was acting merely in the capacity of agent. After the company had received the goods and given its receipt for them to the agent, and before they were started upon their journey, the company, upon the order of the agent and without the authority of the owner, delivered them to another person. The plaintiff thereupon sued the company for a conversion. "In the case before us," said the court, "the proof was given, and the jury found that the goods did not belong to the consignees, but were the property of the shipper, and that this was known to the carrier. The question is, rather, where it is known that the goods are the property of the shipper and have been shipped by him for delivery to the consignees as his agents at a distant place, can the carrier deliver the goods to such consignees or to their order at another place, or without starting them on their journey? We think the rule is that, where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only, for his interest, upon such terms as he dictates in regard to the delivery, and that the consignees are to be regarded simply as agents selected by him to receive the goods at a place indicated. Where he is an agent merely, the rule is different."⁹

8. 94 U. S. 549.

9. "This is illustrated," continued the court, "by the case of *Thompson v. Fargo*, 49 N. Y. 188. Thompson had, as the agent of White, collected certain moneys

belonging to White, and, inclosing them in a package directed to White at Terre Haute, Ind., sent the package from Decatur, in the same state, by the express company. Various attempts were

Sec. 737. (§ 395a.) Same subject—Change cannot be made after transportation completed.—So it is said that any change in the destination must be made while the goods are *in transitu*, and that it cannot be required after the goods have reached

made to deliver the package to White, but he could not be found; and Thompson, the shipper, at length demanded the return to him of the package, and, on refusal, brought an action to recover its value. The court of appeals of New York held that if the case had been one of a sale by the consignor, with no directions from the consignee how to ship the goods, the former, as the title would remain in him, might maintain an action, but not when he was the mere agent, having no interest in the property, but acting pursuant to the orders of the owner in shipping it; that a delivery to him would be no defense to an action by the owner. The case of *Duff v. Budd*, 3 Brod. & B. 177, holds the same rule. The numerous cases cited by the plaintiff in error, to the effect that any delivery to the consignee which is good as between him and the carrier is good against the consignor, are cases where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee. This gives to the consignee the implied ownership of the property, and hence justifies the carrier in taking his direction as to the manner of delivery. In addition to those authorities, reference may be had to *Sweet v. Barney*, 23 N. Y. 335, where a bank in the interior of New York sent by express a package of money directed to 'The People's Bank, 173 Canal street, New York.' The package was delivered to an agent of the People's Bank at the office of the express company, and was stolen from such agent. The bank in the interior brought its action against the express company, and the question was whether the express company was authorized to deliver the package at any other place than 173 Canal street. The court held that, as there was no notice to the express company that the money was not the property of the People's Bank in the city of New York, nor any circumstances to weaken the presumption that the money belonged to that bank, any delivery that was good as to that bank discharged the carrier. Of the character mentioned is the case of the *London & Northwestern Railway Co. v. Bartlett*, 7 H. & N. 400, which is much relied on by the plaintiff in error. The consignee in that case was the purchaser of the wheat in question, and consequently any delivery to him or his order, wherever it might be, would be a discharge to the carrier. The same fact existed in *Mitchel v. Ede and others*, 11 A. & E. 888. The plaintiff recovered the value of the sugars shipped from Jamaica for the reason that, under the circumstances stated he was held to be the owner of them. Upon the same principle is *Foster v. Frampton*, 6 B. & C. 107, where

their destination and the carrier's contract has been thereby performed.¹⁰

VI. EXCUSES FOR NON-DELIVERY.

Sec. 738. (§ 396.) Carrier excused when goods taken from him by legal process.—For what losses the carrier will not be held responsible, when he is not protected by his contract, has been stated in a previous chapter upon the subject of the legal exceptions to his liability in the absence of its limitation by such contract.¹¹ It was there shown that he will be sometimes excused from such liability when the loss has been occasioned otherwise than by the act of God or of the public enemy, as when it has been caused by the inherent tendency of the goods to decay, or by some infirmity or vice against which the carrier cannot guard, or by the fraud or officious intermeddling of the owner. Cases also sometimes occur in which the carrier will be excused from a delivery of the goods where there has been no loss. This occurs when, while being safely kept or carried by him for the owner, they are taken out of his possession by process of law, either mesne or final. That this will excuse the carrier from delivery to the consignee or owner is now almost universally conceded by the courts, in the absence of connivance or collusion on the carrier's part; and it seems to make no difference by or against whom the process is sued out, if it be valid.

Sec. 739. (§ 397.) Same subject.—In *Stiles v. Davis*¹² the plaintiffs had shipped goods by the defendant as carrier. An attachment writ was sued out by the creditors of parties to

the goods were received from the carrier by the actual vendee, and it was held that the *transitus* was at an end. We do not perceive anything adverse to the principles we have stated in the learned opinion delivered by Chief Justice Shaw in *Blanchard v. Paige*, 8 Gray, 281; nor in *Lee v. Kim-*

ball, 45 Me. 172, which holds that where a vendee of goods sells the same before reaching their destination, the right of stoppage *in transitu* is ended."

10. *Melbourne v. Railroad Co.*, 88 Ala. 443.

11. *Ante*, ch. vi.

12. 1 Black 101.

whom the goods had formerly belonged, but who now had no further interest in them. Under this writ the sheriff seized the goods and took them out of the possession of the carrier. They were held by him until judgment and execution were obtained, and were then sold. In the meantime, however, and a few days after the attachment, the plaintiffs made a demand upon the carrier for the goods, which was refused because they had been attached and taken from him; and thereupon they sued him. Verdict having been given for them under the instructions of the district judge, the case was carried to the supreme court of the United States, in which it was held by Nelson, J., that the court below had erred. "After the seizure of the goods by the sheriff under the attachment," it was said, "they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true that these goods had been delivered to the defendant as carrier by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant nor that of the plaintiffs." And the case of *Verrall v. Robinson*¹³ was cited as directly in point.

Sec. 740. (§ 398.) Same subject.—The law as thus stated seems to be generally concurred in by the courts of both this country and of England.¹⁴ And none of the reasons generally

13. *Tyrwhitt's Exch.* 1069, 4 *Steamship Co.*, 37 *id.* 122; *Burton Dowling*, 242. *v. Wilkinson*, 18 *Vt.* 186; *Savannah, etc. R. R. v. Wilcox*, 48 *Ga.*

14. *Bliven v. Railroad*, 36 *N. Y.* 432; *Edson v. Weston*, 7 *Cow.* 403, 35 *Barb.* 188; *Van Winkle v.*

assigned for imposing upon the carrier his extraordinary responsibility would seem to require that he should be denied the right to show in his defense, when called to account for a non-delivery, that the goods had been taken from him by due legal process, according to the law of the land.

278; Ohio, etc. *R. R. v. Yohe*, 51 Ind. 181; *The Idaho*, 93 U. S. 575, 11 Blatch. 218; *Lemont v. Railroad Co.*, 28 Fed. Rep. 920; *French v. Transportation Co.*, 134 Mass. 288; *Pingree v. Railroad Co.*, 66 Mich. 143; *Wells v. Steamship Co.*, 4 Cliff. 228; *McAlister v. Railroad Co.*, 74 Mo. 351; *Furman v. Railroad Co.*, 57 Iowa, 42; 62 *id.* 395; 68 *id.* 219; 81 *id.* 540; 46 N. W. Rep. 1049; *Railway Co. v. Doremeyer*, 20 Ind. App. 605, 50 N. E. Rep. 497, 67 Am. St. Rep. 264; *Railway Co. v. Wright*, 25 Ind. App. 525, 58 N. E. Rep. 559; *Jewett v. Olsen*, 18 Ore. 419, 23 Pac. Rep. 262, 17 Am. St. Rep. 745; *Hett v. Railroad Co.*, 69 N. H. 189, 44 Atl. Rep. 910; *Railroad Co. v. Bossut*, 10 N. Mex. 322, 62 Pac. Rep. 977.

In *Mierson v. Hope*, 2 Sweeney, 561, the defendant pleaded that the goods had been taken from his possession by writs of replevin, and upon the trial offered the record of the pleadings and proceedings in the replevin suits. He also offered to prove that the goods belonged to the plaintiffs in these actions. But this evidence was excluded by the court below, which also refused to charge that the carrier was bound to give notice of the suits to the plaintiff or to submit any question of fact to the jury, but directed a verdict for the defendant without any other proof than the mere produc-

tion of the records of the replevin suits.

It was held by Monell, J., in the superior court, to which this was appealed, that this was error, and upon the question of the effect of the seizure of the goods under legal proceedings, without notice to the plaintiff, upon the carrier's liability, the learned judge remarks: "But without any other or further proof than the mere production of the record of the proceedings in the actions against the defendant, the learned justice held such record to be conclusive without any proof whatever of any title to the goods in the plaintiffs in those actions, and without any proof of notice to the plaintiff that he might come forward and defend or protect his title.

"However unsettled the law may be, and it may be said to be quite unsettled, in regard to the right of the carrier to dispute the title of the person who delivers the goods to him, or to set up an adverse title to defeat the right of action upon his contract, it nevertheless cannot be denied that where the carrier is allowed to do so, the onus is upon him to establish such paramount title.

"On the trial, an offer was made by the defendant to prove that the plaintiffs in the replevin suits were the owners of the goods; but the evidence was ex-

In a case in Michigan,¹⁵ the plaintiffs had a chattel mortgage on property belonging to B. B. transferred the property to S., and plaintiffs replevied it from him and shipped it, consigned to themselves, over defendant's road to Detroit. On the way the goods were seized on an attachment issued against B. in favor of third persons. Defendant notified the plaintiffs of this seizure, but the plaintiffs sued for not delivering the goods at Detroit. The question litigated was whether this seizure exonerated defendant from such delivery, and the trial court held that it did. This was affirmed in the supreme court. Said Campbell, C. J.: "There seems to be a little apparent conflict between the cases on this question, but there can be no doubt where the rule of justice lies. If the carrier could rely against all the world upon the right of the consignor to intrust him with possession, then it would be reasonable to hold him estopped from questioning that title. But there is no authority for such immunity. The true owner may take his property from a carrier as well as from any one else. If a carrier gets property from a person not authorized to direct

cluded by the court on the ground that the judgments in those actions were a bar to a recovery here. It may not be out of place to see whether this proposition, under the facts of the case, can be sustained.

"I do not think it can be claimed that the rule is well established, that the mere taking of goods from the bailee or carrier by process of law is by itself a complete justification for not delivering. If such a rule was to be established, and the bare production of legal process under which the property had been taken should be deemed conclusive, without any proof of title in the person asserting a paramount title, it would, in almost every case, place it out of

the power of the bailor to ever reclaim his property, and until some authoritative decision to that effect is rendered, I am unwilling to adopt any such proposition.

"I think the true rule is, that a bailee or carrier who attempts to shield himself behind 'a process of law,' by which he has been deprived of the property, should be required to show that the person claiming the paramount title was the true owner." Citing and commenting upon *Edson v. Weston*, 7 Cow. 278; *Van Winkle v. Steamship Co.*, 37 Barb. 122; *Bliven v. Railroad Co.*, *supra*; *Bates v. Stanton*, 1 Duer. 79.

15. *Pingree v. Railroad Co.*, 66 Mich. 143.

its shipment, he has been declared by the supreme court of this state to have no lien for his service, and no right to retain the property.¹⁶ There is no sense or justice in enabling a consignor to compel a carrier, at his peril, to defend a title that he knows nothing about, and has no means of defending unless the consignor gives it to him. In the present case the attachment was against plaintiff's mortgagors, and was regular. It must have been levied on the claim that plaintiffs had no right to the goods. Defendant could not have resisted the seizure without incurring the risk of serious civil, and perhaps criminal, liability; and, if plaintiff's claim is correct, this must have been done at defendant's own risk and expense.

"This precise question was decided in favor of the carrier in *Stiles v. Davis*,¹⁷ upon the ground that defendant was not required to resist the sheriff and could not properly do so. This rule has been adhered to by the United States supreme court and followed to a considerable extent. It is the only rule compatible with public order. A carrier must otherwise resist the officer, or find some one who will swear out a replevin, which a carrier usually has not knowledge enough to justify. If the carrier cannot call on the consignor to defend, and must take the risk and the loss, his position would be one of hopeless weakness. If he declines to accept custody of goods, he runs the risk of an action; and if a wrongful holder, by doubtful title, or even by theft, compels him to receive the consignment, he can get the value from the carrier who has had them seized by the true owner, unless the carrier has means of proof, that he never can be presumed to have, of the lack of interest in the shipper.

"Whatever may be a carrier's duty to resist a forcible seizure without process, he cannot be compelled to assume that regular process is illegal, and to accept all the consequences of resisting officers of the law. If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority."¹⁸

16. Citing *Fitch v. Newberry*, 1 Doug. 1.

17. 1 Black. 101.

18. *Jewett v. Olsen*, 18 Ore. 419, 23 Pac. Rep. 262, 17 Am. St. Rep. 745, is to same effect.

Sec. 741. (§ 399.) Same subject—The rule in Massachusetts.—But it has been held by the supreme court of Massachusetts that the attachment suit, or other proceeding under which the goods are taken by the officer from the custody of the carrier, must be against the person to whom the goods belong. If, for instance, the writ direct the seizure of the goods of the consignor for a debt, which he owes, and the goods are seized by virtue of it, and it should turn out that the goods belonged to the consignee, who was in no wise responsible for the debt, such seizure will be no defense for the carrier in a suit for a non-delivery. This, it is said, would be the taking of one man's property under process against another, and for a debt which the owner did not owe, and with which he had no concern, and would clearly be a trespass on the part of the officer, to which the carrier is not obliged to yield; and if he do, he must take the consequences and respond to the owner for the loss.¹⁹ And it has been held in the same state that such seizure is no protection to the carrier, if the goods are such as are not liable to be seized or levied upon under legal process. In this case the levy was made upon intoxicating liquors in the custody of the carrier. A law of the state had provided that no such liquors should be sold within its limits, making no exceptions

In *The Ohio, etc. R. R. v. Yohe, supra*, the question whether a plea by the carrier, setting up that the property was taken from it by a replevin writ sued out by a third party, was a valid plea without other averments as to the title of the plaintiff in the replevin suit, and presented a sufficient defense, was brought directly before the court by demurrer, and it was held that the plea as to that point was good; though it was held defective, because it did not aver that the carrier gave notice to the shipper of the seizure of the goods. The same cases were relied upon to sustain the opinion

of the court which are reviewed in the foregoing case of *Mierson v. Hope*.

So in *Savannah, etc. Co. v. Wilcox, supra*, the goods were taken from the carrier by what is called a possessory warrant, issued by a justice of the peace, and it was held that, if the warrant was valid, no further inquiry need be made, as a seizure under it of the goods while in the carrier's possession would be a good excuse for their non-delivery.

19. *Edwards v. Transit Co.*, 104 Mass. 159. To same effect, *Gibbons v. Farwell*, 63 Mich. 344.

of sales under judicial process. It was decided that the officer could not levy upon that which he could not sell; that therefore his seizure of such goods was without authority, and a trespass, and did not excuse the carrier from a delivery according to his contract.²⁰

Sec. 742. (§ 400.) Same subject—Process must be regular.—

In order, however, that such seizure may be a legal excuse for the non-delivery of the goods, it has been said that it must be shown that the proceeding or process under which it was made by the officer was legal and valid, and that it empowered him to make it; for if it was void because issuing from a court having no jurisdiction, or for any other reason, and conferred no such authority, he would be a mere trespasser, and the carrier would be no more obliged to submit to his acts under it than to those of any other wrong-doer.²¹ But it is doubtful whether, under the later cases, more should be required than that the process should be fair upon its face; for if it would justify the

20. *Kiff v. The Railroad*, 117 Mass. 591.

The seizure of the goods upon a writ of attachment will not excuse non-delivery where the goods are not actually taken out of the carrier's possession and the writ is afterwards dismissed. *Faust v. Railroad Co.*, 8 S. C. 118.

In *Nickey v. Railway Co.*, 35 Mo. App. 79, it was held that a carrier is liable who surrenders goods to a person who exhibits only a telegram from a sheriff of another county directing him to seize them on a writ of attachment, said to be in the sheriff's hands, and that the subsequent seizure of the goods on this writ was no defense. *A fortiori* will the carrier be liable when no process whatever issued. *Bennett v. Express Co.*, 83 Me. 231, 22 Atl. Rep. 159.

21. *Savannah, etc. Co. v. Wil-*

cox, 48 Ga. 432; *Bliven v. Railroad Co.*, 36 N. Y. 403; *Edwards v. Transit Co.*, 104 Mass. 159; *Kiff v. Railway Co.*, 117 Mass. 591; *Gibbons v. Farwell*, 63 Mich. 344; *Merz v. Railway Co.*, 86 Minn. 33, 90 N. W. Rep. 7; *Bennett v. Express Co.*, 83 Me. 236, 22 Atl. Rep. 159.

The plaintiff caught in Lake Minnetonka in the state of Minnesota and shipped to Minneapolis in the same state a quantity of fish. When the fish arrived at Minneapolis they were seized by a game warden under a law that the legislature had previously repealed. The court held that the game warden took the fish without either legal or apparent right, and that therefore the common carrier was not excused by reason of such wrongful taking from delivering them to the plaintiff. *Merriman v. Express Co.*, 63 Minn.

officer in serving it, it ought to justify the carrier in yielding to it.²²

Sec. 743. (§ 401.) Same subject—Carrier must give notice of seizure to owner.—The carrier is also required to give prompt notice to the consignor or owner of the goods, if known, of such seizure, or of the institution of legal proceeding against the goods, in order that he may have the opportunity of showing his title to the goods, or of protecting his interest in them. And a plea setting up as a defense by him a seizure by an officer under legal process was held to be bad on demurrer, because it did not aver the giving of such notice.²³ If, therefore, notice is properly given by the carrier, an action for conversion will not lie; for the carrier has the right to presume that the party notified will attend to his property and protect it in the suit.²⁴

Sec. 744. (§ 401a.) Same subject—Carrier by water must defend suit till owner notified.—A carrier by water must do more. "Upon the well-settled rules of maritime law, it is the undoubted duty of the master, upon any interference with his possession, whether by legal proceedings or otherwise, to interpose for the owner's protection, and to make immediate assertion of his rights and interests, by whatsoever measures are appropriate at the time and place. To that extent the master is bound to take part in legal proceedings, and to continue them until, after informing his absent consignee, both of

543, 65 N. W. Rep. 1080, citing *Hutch. on Carr.*

22. See *McAlister v. Railroad Co.*, 74 Mo. 351, where a regular writ issued under a statute afterwards held unconstitutional was said to justify the carrier.

23. *Ohio, etc. R. R. v. Yohe*, 51 Ind. 181; *Bliven v. Railroad Co.*, 36 N. Y. 403; *Miersen v. Hope*, 2 Sweeney, 561; *Robinson v. Railroad Co.*, 16 Fed. Rep. 57, 9 Fed. Rep. 129; *Thomas v. Express Co.*, 73 Minn. 185, 75 N. W. Rep. 1120; *Railroad Co. v. O'Donnell*, 49 Ohio

St. 489, 32 N. E. Rep. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579; *Jewett v. Olsen*, 18 Ore. 419, 23 Pac. Rep. 262, 17 Am. St. Rep. 745.

If the shipper replevies the goods from the carrier, and the latter does not give notice of the replevin action to the consignee, the carrier is not exonerated from liability to the consignee. *Spiegel v. Steamship Co.*, 56 N. Y. Supp. 171, 26 Misc. 414.

24. *Merz v. Railway Co.*, 86 Minn. 33, 90 N. W. Rep. 7.

the facts and the local law, so far as need be, the owner has a reasonable opportunity to take upon himself the burden of the litigation. The question arises under the law of the sea, not of the land.²⁵

Sec. 745. (§ 401b.) Same subject—Seizure must not have been brought about by laches or connivance of carrier.—But in order that the seizure shall excuse the carrier, it must have been made without laches, connivance or collusion on his part.²⁶ As has been seen in the preceding sections, he must protect the owner's rights, he must give him prompt notice of the proceedings, and he cannot excuse himself where he invites or colludes in the appropriation of the goods, or stands idly by until they are appropriated.

Sec. 746. (§ 402.) The effect of garnishment or trustee process upon the property in the custody of the carrier.—The question has been raised whether the carrier could be summoned to answer by trustee or garnishment process, and in the meantime be required to hold the goods in his charge subject to the future orders of the court. The cases bearing upon this question are few in number and not entirely harmonious. In *Adams v. Scott*,²⁷ an express company, having in its custody a package of money directed to a non-resident of the state, was thus summoned by one of his creditors, and, the contention being made that the process was not applicable to the common carrier, it was said by the court that "there is no reason why a common carrier should not be liable to the trustee process, in the same manner as other bailees are, unless the nature of his contract is such that a judgment charging him as trustee would not protect him against a claim of the defendant for a

25. *Brown, J., in The M. M. Fed. 57; Railroad Co. v. O'Donnell*, 37 Fed. Rep. 708, citing *Willard v. Dorr*, 3 Mason, 166; *Cheviot v. Brooks*, 1 Johns. 364; *Lemon v. Walker*, 9 Mass. 404; *Hannay v. Eve*, 3 Cranch, 247; *The Mary Ann Guest*, Olcott, 501, 1 Blatchf. 358.

26. *Robinson v. Railroad Co.*, 16 Fed. 57; *Railroad Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. Rep. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579; *Railroad Co. v. Ohio Valley Banking & Trust Co.*, 107 Ga. 512, 33 S. E. Rep. 821, citing *Hutch. on Carr.*

27. 104 Mass. 164.

26. *Robinson v. Railroad Co.*, 16

non-delivery of the goods at their place of destination. But we are of opinion that such judgment would be sufficient excuse to the trustee for a failure to deliver according to his contract. The doctrine of the common law, that he is responsible for all losses except those occurring by the act of God or a public enemy, has no application to a case like the present. There has been no loss, but the defendant's property has been sequestrated by the law to be applied to his use and benefit. Every man holds his property subject to be attached, and whenever property is attached in a suit against the owner, and taken into the custody of the law, it excuses the person having possession of it from performing his promise, express or implied, to deliver to the owner. The law substitutes the delivery to its officers for a performance of his contract."

The better reasoned cases, however, do not seem to follow the rule thus broadly laid down in *Adams v. Scott*, and a distinction seems to be drawn in them between garnishment of goods after delivery to the carrier, but before they are actually placed in the car and awaiting transit, garnishment of goods actually in transit or out of the state or county in which the garnishment or trustee process is issued, and garnishment of goods held by the carrier as warehouseman pending delivery to the consignee.

Sec. 747. (§ 403.) Same subject.—Where the goods are actually in the depot or yards of a railway company in the county in which the garnishment or trustee proceedings are instituted, there can be no objection to such process.²⁸ But after the goods have been placed in a car for transportation, and a bill of lading issued by the carrier to the shipper, and the car is waiting to be put into the train, the carrier is not required to forego its right to transport the goods or to receive compensation therefor by reason of the service of garnishment or trustee process upon it.²⁹ The cases in which the

<p>²⁸ <i>Landa v. Holek & Co.</i>, 129 Mo. 663, 31 S. W. Rep. 900, 50 Am. St. Rep. 663; <i>I. C. R. R. v. Cobb</i>, 48 Ill. 402.</p>	<p>²⁹ <i>Baldwin v. Railroad Co.</i>, 81 Minn. 247, 83 N. W. 986, 51 L. R. A. 640; <i>Stevenot v. Railway Co.</i>, 61 Minn. 104, 63 N. W. Rep. 256,</p>
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latter rule was framed were ones in which the goods were intended for transportation to a point outside the state, but the correct principle goes farther and is, that any goods, no matter where their destination may be, when actually in transit, are subject to the same rule, and the carrier is not required to forego the benefit of the contract to transport to destination, stop their transportation and take the goods from the car. The only difficulty is in deciding at just what point the goods are actually in transit.

Upon this subject the supreme court of Illinois held the following language in reference to the garnishment of railway companies: "The question is, Can a railway company be held liable to judgment on a process of garnishment, merely on the ground that it may have had property *in transitu* on its route consigned to one who may be a debtor at the time of issuing and serving the writ? No case has been cited by the appellees in which such a proceeding has been sustained, and, in the absence of precedent, we should be strongly inclined to hold that companies were not so liable; certainly not out of the county where the property delivered to them for transportation is situate. Any other rule would make railway companies collecting agents of creditors, and that, too, at the risk of these companies. They are common carriers of all kinds of manufactured and agricultural products, having a lien upon the articles delivered for the freightage. They are obliged, under ordinary circumstances, to carry all that shall be delivered to them, and they discharge their duty by carrying and delivering according to the contract. It is not their business nor is it their interest to know to whom the various articles belong, nor should it be required of them that conflicting claims to the property intrusted to them should be adjusted through controversies, the burden, annoyance and expense of which they must bear. Where the goods are in the depot of a railway company, in the county in which the attachment proceed-

28 L. R. A. 600. In this latter case the court held that property in the hands of a common carrier in transit to a point outside the state is not subject to garnishment, although it is yet within the state at the time of the service of the garnishee summons.

ings are instituted, there could perhaps be no objection to such process; but on this point we express no definite opinion. When the property has left the county, and is in transit to a distant point, though on the same line of railway, it would be unreasonable to subject the company to the costs, vexation and trouble of such a process, merely because it had received, to be carried, that which the law compelled them to receive and carry.³⁰

Sec. 748. Same subject.—When the goods are once outside the bounds of the state or county beyond which the jurisdiction of the court issuing the process does not extend, they certainly cannot be reached by garnishment or trustee process.³¹ But after the termination of the transportation of the goods, and while the carrier is holding the same as warehouseman, the carrier is liable to garnishment in respect to such property on process issuing from courts having jurisdiction at the place of destination of the goods.³²

Sec. 749. (§ 404.) The duty and liability of the carrier when adverse claim is set up to the property.—The carrier, in common with other bailees, may yield to the demand of the real owner of the goods, and deliver up the possession to him without being compelled to do so by legal proceedings, whenever he becomes satisfied that his bailor is not the true owner; and when he has done so, he is not estopped from showing that his bailor had no title to the goods, but that they really belonged to the person to whom he has surrendered them. The bailment raises a strong presumption in favor of the bailor, but is not conclusive of his title or right to the goods even as against his bailee. It will, however, devolve upon the carrier or other bailee in such a case to show that the party to whom he has delivered the goods is entitled to them, and the burden

30. Ill. Central R. R. Co. v. Sutherland v. Second Nat. Bank Cobb, 48 Ill. 402; Bates v. Rail- of Peoria, 78 Ky. 250; Wheat. v. way Co., 60 Wis. 298, 19 N. W. Railroad Co., 4 Kan. 370.
Rep. 72.

32. Cooley v. Railway Co., 53

31. Ill. Cent. R. R. v. Cobb, 48 Minn. 327, 55 N. W. Rep. 141, 39 Ill. 402; Bates v. Railway Co., 60 Am. St. Rep. 609.
Wis. 298, 19 N. W. Rep. 72;

of proof is upon the carrier. He presumptively holds for his employer, and if a third party sets up a claim to the goods, he will admit it at his peril. In a case in which the carrier gave up the goods to the true owner upon his demand, it was said by the court that "the defendants were common carriers and therefore bound to receive the goods for carriage. They could make no inquiry as to the ownership. They have not voluntarily raised the question, it was raised by the demand of the real owner before the defendants had parted with the goods. The law would have protected them against the real owner if they had delivered the goods in pursuance of their employment without notice of his claim. It ought equally to protect them against the *pseudo* owner from whom they could not refuse to receive the goods, in the present event of the real owner claiming the goods and their being given up to him. The compulsory character of the employment of a carrier furnishes ample ground for so holding; and we do not assent to the altered statement of the law in the later editions of Story on Bailments,³³ the earlier editions of that valuable work having laid it down in accordance with our view."³⁴ The

33. §§ 266 and 582.

34. *Sheridan v. The New Quay Co.*, 4 Com. B. 93 Eng. C. L. R. 618.

Section 582, here alluded to, is as follows: "Another excuse which may be asserted, under certain circumstances, is when the goods are demanded or taken from the possession of the carrier by some person having a superior title to the property. In general the carrier is not permitted to dispute the title of the person who delivers the goods to him, or to set up an adverse title to defeat his right of action growing out of his contract. And this is, emphatically the rule when that adverse claim is not asserted by the superior claimant himself, but is

merely asserted by the carrier of his own mere motion. *Formerly it seems to have been thought that if the adverse title was asserted by the superior claimant, and the carrier had due notice of it and was forbidden to deliver it to the bailor, he might protect himself from responsibility and set up such title against the bailor. But this doctrine, although perhaps maintainable in some cases, under special circumstances, is now deemed to be generally untenable; and, therefore, the carrier may be placed in a position in which he cannot safely deliver the goods to either party. For where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other per-*

law as thus stated is abundantly sustained by the cases.³⁵

Sec. 750. (§ 405.) Carrier cannot of his own motion set up adverse title.—But neither the carrier nor any other bailee can, of his own mere motion, set up the adverse claim of another to the goods as an excuse for withholding them from his bailor. The general rule is that the agent must account to his principal, and cannot set up the *jus tertii*, nor in any way dispute his title, and it applies as well to the common carrier as to the ordinary bailee. The adverse claim must be asserted by the claimant himself or by his authority. No matter how tortious or fraudulent may have been the means by which the bailor acquired possession of the property, nor how entirely destitute of all right to it as against the true owner, the bailee cannot legally withhold it from him unless the owner has set

son, he acts at his peril; and if the adverse title is well founded and he resists it, he is liable to an action for the recovery of the goods by the person setting up such adverse title."

The words inserted in the third edition of the book during the life-time of the distinguished author, and retained in all the subsequent editions, are those in italics. See American notes to *Armory v. Delamirie*, 1 Smith's Ld. Cases, 481, where the decision is briefly commented on and approved. See, also, *Wells v. Express Co.*, 55 Wis. 29.

35. *The Idaho*, 93 U. S. 575, 11 Blatch. 218; *Rosenfield v. The Express Co.*, 1 Woods, 131; *Western Trans. Co. v. Barber*, 56 N. Y. 544; *Lowremore v. Berry*, 19 Ala. 130; *Harker v. Dement*, 9 Gill, 7; *Floyd v. Bovard*, 6 Watts & S. 75; *King v. Richards*, 6 Whart. 418; *Bates v. Stanton*, 1 Duer, 79; *Hardman v. Willcock*, 9 Bing. 382; *Biddle v. Bond*, 6 Best & S. 225; *Cheesman v. Exall*, 6 Exch. 341;

Dixon v. Yates, 5 B. & Ad. 340; *Wells v. Express Co.*, 55 Wis. 23; *Rogers v. Weir*, 34 N. Y. 463; *American Express Co. v. Greenhalgh*, 80 Ill. 68; *Young v. Railway Co.*, 80 Ala. 100; *Wolfe v. Railway Co.*, 97 Mo. 473; *Railway Co. v. Moline Plow Co.*, 13 Ind. App. 225, 41 N. E. Rep. 480, citing *Hutch. on Carr.*; *Railway Co. v. Jordan Stock Food Co.*, 67 Kan. 86, 72 Pac. Rep. 533; *Thomas v. Express Co.*, 73 Minn. 185, 75 N. W. Rep. 1120, citing *Hutch. on Carr.*; *Merz v. Railway Co.*, 86 Minn. 33, 90 N. W. Rep. 7; *Shellenberg v. Railroad Co.*, 45 Neb. 487, 63 N. W. Rep. 859, 50 Am. St. Rep. 561, citing *Hutch. on Carr.*

As to the right of a carrier to deliver to a mortgagee after the conditions of a chattel mortgage are broken see *Johnston v. Railroad*, — Neb. —, 97 N. W. Rep. 479, citing *Hutch. on Carr.*; *Kohn v. Railroad Co.*, 37 S. Car. 1, 16 S. E. Rep. 376, 24 L. R. A. 100, 34 Am. St. Rep. 726.

up his claim and the bailee has yielded to it; and if the carrier or other bailee, whilst still holding possession of the property, would defend against the claim of his bailor by setting up the paramount title of another, he must at least show that it is done by his authority and on his behalf. Otherwise the bailee might avail himself of the title of a third person which might never be asserted by such person, and thus be enabled to keep the property for himself without a shadow of title, when by his contract he had undertaken to return it to the bailor or to deliver it according to his directions.³⁶ But so soon as he has restored it to the person to whom it belongs, or has agreed, upon his demand, to hold it for him, the estoppel ceases, because the original bailment has come to an end by that which is equivalent to an eviction by title paramount.³⁷

Sec. 751. (§ 406.) Yet claim upon him by adverse claimant is sufficient.—But while it is not enough that the carrier has become aware of the title or claim of a person other than the bailor or consignee, to entitle him to set up such claim or title against the demand of the latter, yet if he has been notified by the claimant of his title, and has been requested not to deliver the goods according to his undertaking, he would, no doubt, be permitted, in an action against him by the bailor or consignee, to prove that such claimant was entitled to the goods and had forbidden their delivery to the bailor or according to his directions; because, although he may not have actually yielded the possession to the claimant nor have acknowledged his title, the defense would be considered as made by his request and in his behalf; and the very fact of making use of the adverse claim, under such circumstances, to defeat a recovery by the bailor, would be construed as an implied yielding to it.³⁸

36. See *Wells v. Express Co.*, 55 Wis. 23; *Valentine v. Railroad Co.*, 92 N. Y. Supp. 645. *Sandars*, 6 Ad. & El. 515; *Gosling v. Birnie*, 7 Bing. 339; *Holl v. Griffin*, 10 *id.* 246; *Great Western F'y v. Crouch*, 3 H. & N. 183; *Burroughs v. Bayne*, 5 *id.* 296; *The Idaho*, *supra*.

37. *Story on Bail*, §§ 450, 582; *Story on Agency*, § 217; *Edwards on Bail*, 305; *Western Trans. Co. v. Barber*, 56 N. Y. 544; *Laclouch v. Towle*, 3 Esp. 114; *Kieran v.* 38. *Wells v. Express Co.*, 55 Wis. 23; *Bates v. Stanton*, 1 Duer,

Sec. 752. (§ 407.) Course to be pursued by carrier—Interpleader—Indemnity.—In such cases, however, if it should turn out that such claimant has not the paramount title as against the bailor, the withholding the goods by the carrier from the latter will be treated as a conversion by him. And so, when a demand is made upon him by the adverse claimant, if the carrier should refuse to surrender the goods to him, he will be equally guilty of a conversion, if the title of such claimant should prove to be the better, and he, as the true owner, was really entitled to them.³⁹ Where, therefore, the title to the property is disputed, and it becomes difficult or impossible for the carrier to determine who is entitled to them, he may be placed in a perilous position; for, no matter to which he gives up the goods, whether to the bailor, or in pursuance of his directions, or to the adverse claimant, he will be in danger of being held to account for them by the other, as for a conversion, if he can show the better title. Under such circumstances, it sometimes becomes advisable for the carrier, instead of taking it upon himself to determine between the conflicting claims, to bring the parties before the proper legal tribunal by a bill of interpleader, in order that the parties may litigate the question of title *inter sese*, and have it there determined. He may, however, generally avoid the expense and delay of such a proceeding by delivering the property to the party who seems best entitled to it, upon being indemnified by him against loss in case it should turn out otherwise.

79; *Sheridan v. The New Quay Co.*, was still in force between the *supra*; 1 Smith's Ld. Cas. *481, notes to *Armory v. Delamirie*; *Shellenberg v. Railroad Co.*, 45 Neb. 487, 63 N. W. Rep. 859, 50 Am. St. Rep. 561, citing *Hutch. on Carr.*

39. *Lester v. Railroad Co.*, 73 Hun, 398, 26 N. Y. Supp. 206, citing *Hutch. on Carr.* But in this case there was no conversion because at the time of delivery by the carrier to the consignee there

was still in force between the consignor and consignee a contract by which the consignee was entitled to the possession of the goods, although title was reserved in the consignor, and the contract was recognized as still being in force after delivery by the carrier, by the consignor accepting payments from the consignee on the goods according to the terms of the agreement.

Sec. 753. (§ 408.) Same subject—Entitled to reasonable time to investigate title.—It should be observed, however, that the carrier, when a demand is made upon him for the goods by another than his bailor or his consignee, may withhold the goods for a sufficient time to satisfy his honest doubts, without making himself liable for a conversion of them. But in such cases he should put his reason for not making an immediate delivery upon that ground, and it must appear that he acted in good faith for that purpose.⁴⁰ And if he has delivered the goods to the consignee before he is made aware that the bailor was not the rightful owner, or before any adverse claim is set up to them, he cannot, of course, be held liable to another, though the true and rightful owner. Any such liability would be an intolerable hardship upon the carrier.⁴¹

Sec. 754. (§ 408a.) Carrier not liable for not permitting goods to be seized on process not against owner.—So, clearly, the carrier cannot be held liable to an action for refusing to permit goods to be seized on legal process not directed against the owner.⁴²

Sec. 755. The duty and liability of the carrier when goods are detained by customs officials.—The parties to the contract of carriage must be presumed to have contracted with the common knowledge of the necessity for customs detention and inspection, and the burden is on the shipper to make provision for the passage of his property beyond the borders of the foreign territory, if non-dutiable. The carrier is wholly powerless to prevent its seizure and detention and he cannot be held liable for its destruction, either in transit or at the place of destination, while in the possession of customs house officials, by a fire which he did not occasion, and which he could not,

40. *Solomons v. Dawes*, 1 Esp. 83; *Green v. Dunn*, 3 Camp. 215; *Dunlap v. Hunting*, 2 Denio, 643; *Holbrook v. Wight*, 24 Wend. 169; *Rogers v. Weir*, 34 N. Y. 463; *Merz v. Railway Co.*, 86 Minn. 33, 90 N. W. Rep. 7.

41. *Sheridan v. The New Quay Co.*, *supra*; *Shellenberg v. Railroad Co.*, 45 Neb. 487, 63 N. W. Rep. 859, 50 Am. St. Rep. 561.

42. *Simpson v. Dufour*, 126 Ind. 322, 26 N. E. Rep. 69; *s. c.* 95 Ind. 302.

by any possible act of diligence, have prevented.⁴³ But when the governmental power prevents the carriage of the goods to their destination until the duties are paid, it is the carrier's duty to take all practicable means to notify the consignees, and, failing in that, to notify the shippers of the situation. Meanwhile the carrier is at liberty to turn the goods over to the customs officers, or to store them in a suitable and reasonably safe place. If he fails in that duty and damage results, he will be liable for such damage.⁴⁴

Sec. 756. Commendable motives of carrier no excuse for non-delivery.—Commendable motives on the part of the carrier and a sincere belief that he is subserving the public good in keeping the goods from the consignee will be no defense in an action by the consignee for the conversion of the goods. The carrier is not liable if the goods are taken from his possession by legal process against the owner, or if, without his fault, they become obnoxious to the requirements of the police power of the state, and are injured or destroyed by its authority; or where they are infected with contagious disease, or are intoxicating liquors intended for use or sale in violation of the laws of the state, which require their seizure or destruction. But where the goods are intended for a lawful purpose, and their sale is not unlawful, the carrier cannot constitute himself the judge as to whether public policy should preclude him from delivering the goods to the consignee. Thus in one case the plaintiff delivered to the defendant at Newark, Ohio, on January 1, 1885, a quantity of fire-arms and ammunition, to be transported to Shawnee, consigned to the plaintiff. The defendant did not transport the property to Shawnee, but retained and concealed it, and carried it out of the state. The plaintiff brought an action for the conversion of the goods. The answer of the defendant alleged that before and at the time the defendant received the property for transportation, a state of war and insurrection existed at and about Shawnee, where

43. *Parker v. Steamship Co.*, Hun, 423, 36 N. Y. Supp. 544. 76 N. Y. Supp. 806, 74 App. Div. 44. *Pennsylvania Co. v. Railway* 16; *Howell v. Railway Co.*, 92 Co., 107 Ill. App. 386.

murder and other crimes were being committed; that the fire-arms and ammunition shipped to the plaintiff were to be used in aid of the insurrection, and for other criminal purposes, and that, under the advice and direction of the then governor of the state the defendant shipped the goods out of the state until May 4, 1885, when they were transported to Shawnee, and there stolen and carried away by the plaintiff and his associates. The court held that a common carrier who, having received goods to be carried to a designated place, transports them to another place to prevent their coming to the possession of the consignee, and deprives him of their use and possession, is liable for conversion of the goods; that, after such conversion, the consignee is under no obligation to receive the goods, and that it is no defense to his action for their value that they were tendered to him after the conversion and were then stolen without the negligence of the carrier.⁴⁵

VII. STOPPAGE IN TRANSITU.

Sec. 757. (§ 409.) Carrier may show stoppage to excuse delivery.—Another excuse which the carrier may set up for the non-delivery of the goods is, that the vendor has exercised his right of stoppage *in transitu*. This right arises upon the discovery by the vendor, after the sale of the goods on a credit, of the insolvency of the buyer, and is said to be based on the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts. If, therefore, after the vendor has delivered the goods out of his own possession, and has put them into the hands of the carrier for delivery to the buyer, he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people. This right of the vendor of the goods is held to continue from the time he parts with their possession until they have come into the actual

⁴⁵ *Railroad Co. v. O'Donnell*, 21 L. R. A. 117, 34 Am. St. Rep. 49 Ohio St. 489, 32 N. E. Rep. 476, 579.

possession of the buyer, and may be enforced by him, no matter into whose possession they may have come in the course of the transportation, at any time before their delivery to the buyer or his agent, or to a purchaser of them from the buyer, by a *bona fide* indorsement and transfer of the bill of lading. The right is highly favored by the law on account of its intrinsic justice, and prevails almost universally among civilized nations; but it arises only in favor of one who stands in the relation of vendor to the goods.¹

Sec. 758. (§ 410.) How right exercised.—No particular form or mode has been held necessary in the exercise of this right, and it has even been said that the vendor was so much favored in exercising it as to be justifiable in getting his goods back, by any means not criminal, before they reached the possession of an insolvent vendee. All that is required is some act or declaration of the vendor, or his agent, countermanding the delivery, and the usual mode is by a simple notice to the carrier, stating the vendor's claim, forbidding delivery to the vendee, or requiring that the goods shall be held subject to the vendor's orders.² The vendor may, however, and sometimes does, resort to a possessory legal action, such as replevin or attachment, in the first instance, and takes the goods by legal process, either from the carrier himself or from some officer who has seized them for a debt of the vendee. Or resort may be had to a bill in equity, the jurisdiction of which to enforce the vendor's right of stoppage is said to be unquestionable.³

1. *Branan v. Railroad Co.*, 108 Ga. 70, 33 S. E. Rep. 836, 75 Am. St. Rep. 26, citing *Hutch. on Carr.*; *Delta Bag Co. v. Kearns*, 112 Ill. App. 269, citing *Hutch. on Carr.* 93; *Litt v. Cowley*, 7 Taunt. 169; *Newhall v. The Railroad*, 51 Cal. 345; *Howe v. Stewart*, 40 Vt. 145; *Blum v. Marks*, 21 La. Ann. 268; *McFetridge v. Piper*, 40 Iowa, 627; *Thompson v. The Railroad*, 28 Md. 396; *Covell v. Hitchcock*, 23 Wend. 611; *Jones v. Earl*, 37 Cal. 630; *Whitehead v. Anderson*, 9 M. & W. 518; *Pool v. Railroad Co.*, 23 S. C. 286.

2. *Allen v. Railroad Co.*, 79 Me. 327; *Reynolds v. The Railroad*, 43 N. H. 580; *O'Brien v. Norris*, 16 Md. 122; *Rucker v. Donovan*, 13 Kan. 251; *Bell v. Moss*, 5 Whart. 169; *Mills v. Ball*, 2 Bos. & P. 457; *Newhall v. Vargas*, 13 Me. 3. *Schotsmans v. Railway Co.*, L. R. 1 Eq. 349, L. R. 2 Ch. App.

Sec. 759. (§ 411.) Who may exercise the right—Agent—Want of privity.—The notice may be given by the vendor himself or by his agent, and it is not necessary that the agent should have any especial authority to stop the goods. If he has authority to act for the vendor, either generally or for the purposes of the consignment in question, it is enough.⁴ But if the stoppage be ordered by a stranger, absolutely without authority, the act will be unauthorized, and cannot be ratified by the vendor after the goods have come to the possession of the vendee. It will therefore be proper for the carrier always to inquire into the authority of the person demanding the withholding of the goods from the consignee to act for the vendor; and if be ascertained that he acts without such authority, it will be the carrier's duty to disregard it and deliver them to the party for whom they were intended. But an admission by an agent of the vendor that he acts in the particular instance without authority will not be conclusive against the validity of the stoppage, because the law will look to the general nature and scope of his agency, and will not be governed by the opinion or admission of the agent.⁵ It is not in the nature of a lien, and therefore is not extended to other persons who have merely liens upon the goods, which cease as soon as they have parted with the possession. So it is said that a consignor who is not the vendor, and between whom and the consignee no privity exists, cannot stop the goods in transit.⁶

332; *Ford v. Sprowle*, 2 A. K. Marsh. 528; *Hause v. Judson*, 4 Dana, 7.

4. *Reynolds v. The Railroad*, *supra*; *Bell v. Moss*, *supra*; *Newhall v. Vargas*, *supra*; *Chandler v. Fulton*, 10 Tex. 2.

5. *Bird v. Brown*, 4 Exch. 786.

6. *Memphis, etc. R. Co. v. Freed*, 38 Ark. 614; *Eaton v. Cook*, 32 Vt. 58; *Jenkyns v. Usborne*, 7 M. & G. 678; *Feise v. Wray*, 3 East, 93.

In order that the vendor of

goods may exercise the right of stoppage *in transitu*, they must be in transit from him to his immediate vendee. Thus if one buys goods of another with directions to consign them to a third party, and the seller consigns the goods as directed, there being no privity between the vendor and such third party, the seller loses his right to stop the goods upon the insolvency of the one who has purchased from him. *Neimeyer*

Sec. 760. (§ 412.) To whom notice is to be given.—The notice must also be given to the person in possession of the goods; or, if to his employer or agent, then under such circumstances and at such time as to give to such employer or servant an opportunity, by the use of reasonable diligence, to send the necessary orders to the party who has the goods in his possession. As said by Parke, B.: “To make a notice effective as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods; or if given to the principal, whose servant has the custody, it must be given as it was in *Litt v. Cowley*,⁷ at such a time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee; and to hold that a notice to a principal at a distance is sufficient to revest the property in the unpaid vendor, and render the principal liable in trover for a subsequent delivery by his servants to the vendee, when it was impossible, from the distance and the want of means of communication, to prevent that delivery, would be the height of injustice.⁸

Sec. 761. (§ 413.) Vendee must be insolvent—What constitutes insolvency.—The vendor can only exercise this right against one who is insolvent or bankrupt, and whose insolvent condition, though it may then have existed, was not known to him at the time of the sale, but was afterwards discovered;⁹

Lumber Co. v. Railroad, 54 Neb. 321, 74 N. W. Rep. 670, 40 L. R. A. 534.

7. 7 Taunt. 169.

8. *Whitehead v. Anderson*, 9 M. & W. 518; *Bell v. Moss*, 5 Whart. 189; *Poole v. Railway Co.*, 58 Tex. 134; *Rosenthal v. Weir*, 170 N. Y. 148, 63 N. E. Rep. 65, 57 L. R. A. 527, *affirming* 66 N. Y. Supp. 841, 54 App. Div. 275.

Where the carrier has the shipper who desires goods to be stopped *in transitu* enter into an indemnifying bond and refuses to

allow him to send a dispatch over the public telegraph and undertakes to send the same over its own private wire and then negligently delays the sending of the dispatch so that the goods are delivered to the consignee, it cannot set up that the goods were beyond its line at the time, or its ignorance of whose charge the goods were then in, and it is liable for loss occurring by reason of its negligence. *Willock v. Railway Co.*, 79 Mo. App. 76.

9. *Schuster v. Carson*, 28 Neb.

and it would seem that the insolvency of the buyer, in order to justify the proceeding, must be evident. Goods cannot be arrested on their way to the purchaser because his ability to pay for them is doubtful, nor unless he is actually insolvent when they are stopped. But what should be deemed sufficient evidence of "insolvency" is a difficult question. It is a fact to be made out by proof, showing the inability of the vendee to meet his engagements, either by record or other evidence, such as a return of *nulla bona* upon an execution, the dishonor of negotiable paper, or a failure to meet other business engagements from inability to do so. By the word itself is meant a general inability to pay one's debts; and of this inability the failure to pay one just and admitted debt would probably be sufficient, and the fact that the consignee or buyer has "stopped payment" has been considered, as a matter of course, to be such an insolvency as justified a stoppage *in transitu*.

Sec. 762. (§ 414.) Transfer of bill of lading to bona fide holder defeats rights.—The right of stoppage *in transitu* may be defeated when the goods are represented by a bill of lading, which is a symbol of the property, and the vendee, being in possession of it by the vendor's consent, transfers it to a third person, who *bona fide* gives value for it.¹⁰ And it has

612, 44 N. W. Rep. 734; Fenkhausen v. Fellows, 20 Nev. 312, 21 Pac. Rep. 886; Walsh v. Blakely, 6 Mont. 194; Farrell v. Railroad Co., 102 N. C. 390; United States, etc. Co. v. Oliver, 16 Neb. 612; Loeb v. Peters, 63 Ala. 243; Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496, 54 Am. St. Rep. 114, 18 So. Rep. 175; Jeffris v. Railroad Co., 93 Wis. 250, 67 N. W. Rep. 424, 57 Am. St. Rep. 919.

"Actual insolvency of the vendee is not essential. It is sufficient if, before the stoppage *in transitu*, he was either in fact insolvent, or had, by his conduct

in business, afforded the ordinary apparent evidences of insolvency. Nor is the vendor's right abridged, or in any way affected by the fact that he has received the vendee's bills of exchange or other negotiable securities for the whole price, even though they may have been negotiated and are still outstanding. Diem v. Koblitiz, 49 Ohio St. 41, 29 N. E. Rep. 1124, 34 Am. St. Rep. 531.

10. Loeb v. Peters, 63 Ala. 243; Becker v. Hallgarten, 86 N. Y. 167; First National Bank v. Schmidt, 6 Colo. App. 216, 40 Pac. Rep. 479. So where, at the buyer's request,

been held that such an assignment defeats the right, although it may have been made after the notice to the carrier by the vendor, in the exercise of his right of stoppage, not to deliver the goods to the buyer, provided the assignee of the bill of

the goods were shipped in his name as consignor to a third person, it was said that the vendor's right of stoppage was defeated. *Treadwell v. Aydlett*, 9 Heisk. 388.

The right of stoppage *in transitu* exists against the vendee and all purchasers from him, until there has been an actual delivery of the goods to the vendee, or to a purchaser under his order; and until such delivery has been made and possession of the goods obtained, the title of a *bona fide* purchaser from the vendee, without notice, can only be made good against the exercise of such right by an assignment of the bill of lading. *Branan v. Railroad Co.*, 108 Ga. 70, 30 S. E. Rep. 836, 75 Am. St. Rep. 26.

A mere resale by the buyer without an actual delivery of the goods or an assignment of the bill of lading, therefore, does not defeat such right of stoppage. And the subsequent possession of the goods by such purchaser, acquired by means of a replevin suit, does not alter the case, notwithstanding such purchaser may in perfect good faith have paid his money in expectation of getting the goods in question. *Delta Bag Co. v. Kearns*, 112 Ill. App. 269.

In *Railway Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. Rep. 608, 27 Am. St. Rep. 861, two days before the carrier was notified to stop the goods the vendee transferred and assigned the bill of lading to a *bona fide* holder, who

had no knowledge of the vendee's insolvency, as collateral security for a cash loan. Two days later the vendor stopped the goods *in transitu* and obtained possession of the goods from the carrier. The pledgee of the bill of lading sued the carrier for the value of the goods. The court said in part: "It is held by some authorities that where a bill is assigned as collateral security, the rights of the pledgee thereunder are the same as those of an actual purchaser of the goods for value, as far as the exercise of those rights is necessary for the holder's protection; and that one who makes a temporary advance to the vendee, taking the bill as his security, has the same rights as the buyer of the goods (i. e., the person who takes a *bona fide* transfer of the bill of lading from the vendee)." In any event it must be conceded that, if a transfer of a bill of lading by way of pledge or mortgage, or as collateral security for a loan, does not absolutely defeat the right of stoppage *in transitu*, the seller cannot exert that right until he has discharged the debt secured by the transfer as his right is subject to that of the mortgagee or pledgee.

In the same case it was said that the purpose of issuing bills of lading in duplicate is that all parties may have an original. The duplicate therefore possesses the same characteristics as the original, so-called, retained by the

lading is ignorant that such notice has been given.¹¹ But, as we have seen,¹² the indorsement and transfer of the bill of lading can give no better right to the goods than the indorser himself has, and, if it be lost or stolen, the finder or thief can confer no title, even upon an innocent third party, by a transfer to him, although it might have the indorsement of the true owner upon it, as he could do in the case of negotiable instruments. In other words, bills of lading are not negotiable in the commercial sense of that word, but, as between buyer and seller, are treated as mere symbols representing the property named in them. Its assignment can only confer such rights upon the assignee as the assignor himself had. If, therefore, the vendor has a right to stop the goods *in transitu* by reason of the insolvency of the vendee, the latter certainly has no right, after the notice to the carrier, to the possession of the goods, nor could the carrier suffer him to take them without becoming responsible to the vendor.¹³

Sec. 763. (§ 414a.) Right not defeated by attachment or garnishment by creditors of consignee.—The seizure of the

vendor. If the seller sends a duplicate to the vendee, and the duplicate is transferred to a *bona fide* purchaser, the right of stoppage *in transitu* is defeated.

11. *Newhall v. The Railroad*, 51 Cal. 345.

12. *Ante*, § 175.

13. In the case of *Lickbarrow v. Mason*, 2 T. R. 63, which is the leading case on this subject, the court of king's bench decided that, by an assignment made by the consignee for a valuable consideration, and without notice to the assignee that the goods were not paid for, the property was absolutely transferred to the assignee, and that the vendor was deprived of the right to stop the goods *in transitu*. The court of exchequer chamber, however, reversed this

judgment, holding that the assignment gave to the assignee no other right or title than the consignee himself possessed, and consequently that the vendor had a right to stop the goods. The judgment was brought before the house of lords, and a *venire de novo* was awarded upon a technical ground. But the court of king's bench adhered to its former decision, and the case was prosecuted no further. Since that time it has never been doubted that the judgment of the king's bench was correct. But the facts in that case showed that the buyer who had assigned the bill of lading had at the time both the title and the immediate right to the possession of the goods. But as soon as notice is given to the car-

goods before delivery at the suit of the consignee's creditors,¹⁴ or the garnishment of the carrier by such creditors,¹⁵ will not defeat the vendor's right of stoppage.

Sec. 764. (§ 414b.) Effect of attachment of goods by vendor.—Whether the right is waived where the seller seizes the goods by attachment as the goods of the vendee while they are yet in transit is a question upon which the authorities are in conflict. The affirmative has been laid down as the rule by some text-writers,¹⁶ chiefly on the authority of one case,¹⁷ while the negative has been asserted in other cases.¹⁸

Sec. 765. Effect of acceptance of drafts or negotiation of notes.—Neither the acceptance of an unpaid draft, nor the sending to the vendee of an account in which he is credited with the draft, nor the negotiation of notes subsequently returned to the vendor and tendered back to the vendee by the vendor will prevent the vendor from stopping the goods *in transitu*.¹⁹

rier, where the vendee is discovered to be insolvent, the vendor re-establishes the lien which he had before he parted with the goods, and thereby deprives the vendee of the right to their possession; and, if the assignment of the bill of lading is afterwards made, though to a person ignorant of such notice, the question would be whether the vendor could be deprived of the security thus acquired, or the assignee could be substituted to any right which his assignor did not possess, by the transfer of an instrument not negotiable.

14. *Farrell v. Railroad Co.*, 102 N. C. 390; *Estey v. Truxel*, 25 Mo. App. 238; *Sherman v. Rugee*, 55 Wis. 346; *Durgy Cement Co. v. O'Brien*, 123 Mass. 12; *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496; 18 So. Rep. 175, 54 Am. St. Rep. 114.

15. *Chicago, etc. R. Co. v. Painter*, 15 Neb. 394.

So the fact that the consignee has been adjudicated a bankrupt before a delivery of the goods to him will afford the trustee in bankruptcy no right to possession of the goods as against the vendor who has exercised his right to stop the goods *in transitu*. *In re M. Burke*, 140 Fed. 971.

16. *Bishop on Contracts*, § 802; *Wait's Act. & Def.* 616.

17. *Woodruff v. Noyes*, 15 Conn. 335.

18. *Allyn v. Willis*, 65 Tex. 65, doubting *Half v. Allyn*, 60 Tex. 278.

19. *Brewer Lumber Co. v. Railroad Co.*, 179 Mass. 228, 60 N. E. Rep. 548, 54 L. R. A. 435, 88 Am. St. Rep. 375; *Diem v. Koblitz*, 49 Ohio St. 41, 29 N. E. Rep. 1124, 34 Am. St. Rep. 531; *Rogers v.*

Sec. 766. (§ 415.) Goods must be in possession of some middleman.—It is essential to the exercise of the right that the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted with, and the purchaser who has not yet received them. But it is not necessary that they should remain in the possession of the carrier, *quà* carrier. When the carrier combines with his business of common carrier that of warehouseman, if the transportation has been completed and the goods put in store, the right of the vendor still exists, and the notice to the carrier will bind him as warehouseman. In the case of water carriers and railroad companies transporting goods as common carriers, therefore, the *transitus* will not be considered as having come to an end, so as to defeat the vendor's right, as soon as the goods have arrived at destination and have been stored, whether such carriers be required to give notice to the consignee or not, or whether their liability be held to cease as carriers upon the arrival and warehousing the goods, without more, or not. As long as the goods are in their custody, whether as carriers or warehousemen, they must recognize the right of the vendor to stop the delivery of the goods to the vendee if he has become insolvent or has not defeated the right by an assignment of the bill of lading to a *bona fide* purchaser.²⁰

Schneider, 13 Ind. App. 23, 41 N. E. Rep. 71.

20. *McFetridge v. Piper*, 40 Iowa, 627; *Calahan v. Babcock*, 21 Ohio St. 281; *Bartram v. Farebrother*, 4 Bing. 579; *Brewer Lumber Co. v. Railroad Co.*, 179 Mass. 228, 60 N. E. Rep. 548, 54 L. R. A. 435, 88 Am. St. Rep. 375.

Delivery of goods in transit by the carrier to another agent merely to perform some act in reference to forwarding them will not affect the vendor's right of stoppage. *Lewis v. Sharvey*, 58

Minn. 464, 59 N. W. Rep. 1096; *In re M. Burke*, 140 Fed. 971.

Where goods have been shipped by a common carrier, and have arrived at the point of destination and notice thereof has been given to the consignee who does not pay the freight nor indicate an intention to receive the goods, and the goods thereafter remain in the custody of the carrier without any agreement that the carrier shall hold the same as agent or warehouseman for the consignee, there is no delivery to the consignee, and the vendor may recover the

Sec. 767. (§ 416.) How long goods will be deemed in transit.

—So long as they remain in any place of deposit connected with their transmission, as in the hands of a middleman, as a packer or warehouseman, or even of an agent of the vendee himself²¹ at any stage of their journey for the purpose of being forwarded,²² or, although they may have passed through the hands of several carriers, if they have still to reach the destination originally intended, they may be stopped by the vendor. And although they may have reached their destination, if anything remains to be done, as the payment of freight upon them, or if they must be weighed before the consignee is entitled to their possession, they are still *in transitu* for the purpose of stoppage by the vendor.²³

Sec. 768. (§ 416a.) Actual or constructive delivery defeats right.—An actual or constructive delivery of the goods to the consignee will, however, defeat the right of stoppage. Up to that time the right may still be exercised, but after that time it is at an end.²⁴ After the goods have once been delivered to the consignee the right of stoppage will not revive because he

goods by stoppage *in transitu*. A sale by the consignee to the carrier under such circumstances, in consideration of the unpaid freight on the goods, and other pre-existing debts, does not constitute the carrier a *bona fide* purchaser. *Wheeling, etc. Railroad Co. v. Koontz*, 61 Ohio St. 551, 56 N. E. Rep. 471, 76 Am. St. Rep. 435.

21. *Buckley v. Furniss*, 15 Wend. 137; *Coates v. Railton*, 6 B. & C. 422; *Cabeen v. Campbell*, 6 Casey, 254; *Harris v. Pratt*, 17 N. Y. 249; *Harris v. Hart*, 6 Duer, 606; *Railroad Co. v. Koontz*, 61 Ohio St. 551, 56 N. E. Rep. 471, 76 Am. St. Rep. 435.

22. See Benjamin on Sales, §§ 839-844, where the cases in which it has been held that the right of

stoppage had ceased when the goods had come to the hands of a forwarding agent for the consignee, and when not, are fully stated.

23. Goods may be stopped in transit when they have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as carrier, but are still in the hands of the carrier as such and for the purposes of transit, although such carrier was the purchaser's agent to accept the delivery so as to pass the property. *Bethell v. Clark*, 20 Q. B. Div. 615; *Lyons v. Hoffnung*, 15 App. Cas. 391.

24. *Schuster v. Carson*, 28 Neb. 612, 44 N. W. Rep. 734; *Klein v. Fischer*, 30 Mo. App. 568; *The Natchez*, 31 Fed. Rep. 615; *Lang-*

reships them to a further point.²⁵ But an order for delivery of the goods at a particular warehouse or point within the original destination cannot ordinarily be considered a direction to start the goods to another destination so as to defeat the vendor's right of stoppage.²⁶

Sec. 769. (§ 417.) What constitutes a delivery.—But it is not necessary that the goods should have come into the actual possession of the buyer, to put an end to the right of the vendor. If the wharfinger or warehouseman is the agent of the buyer to keep the goods for him, or if he has agreed with the buyer before their arrival to receive and hold them for him, or if such is the usage and usual course of dealing between them,²⁷ the vendor's right of stoppage will have ended as soon as the goods arrive and are stored with such agent. And if the consignee, for his own convenience, agree with the carrier to let his goods remain in his warehouse, to be delivered when or as he should want them, or if that be the course of dealing between them, the carrier becomes the warehouseman or agent of the buyer, although he may still have a lien upon them for his freight.²⁸ But the carrier cannot of his own will change

staff *v.* Stix, 64 Miss. 171; Hall *v.* Dimond, 63 N. H. 565; Greve *v.* Dunham, 60 Iowa, 108; Half *v.* Allyn, 60 Tex. 278; Macon, etc. R. Co. *v.* Meador, 65 Ga. 705; More *v.* Lott, 13 Nev. 376.

25. Brooke Iron Co. *v.* O'Brien, 135 Mass. 442.

26. Lewis *v.* Sharvey, 58 Minn. 464, 59 N. W. Rep. 1096.

27. Wentworth *v.* Outhwaite, 10 M. & W. 436.

28. See Taylor *v.* Railway Co., (1901) 1 Q. B. 774, 70 L. J. Q. B. 499.

But the existence of the carrier's lien for unpaid freight charges, it has been held, raises a strong presumption that the carrier continues to hold the goods in its capacity as carrier; and in

order to rebut this presumption there must be proof of some agreement or arrangement between the buyer and the carrier whereby the latter, while retaining his lien, becomes the agent of the buyer to keep his goods for him; and in the absence of such an agreement, unless the evidence justifies the inference that the carrier is holding the goods subordinate to and for the consignee, the fair implication of the law is that, if the goods are in the carrier's warehouse awaiting payment of freight and other charges, the *transitus* has not been ended, and that the carrier holds them in his capacity of carrier to keep good his common law lien for freight and charges, and that they are still

his character so as to become the buyer's agent or warehouseman without the latter's assent, nor can the buyer change the capacity in which the carrier holds the goods, so as to make him a bailee for the buyer, without the carrier's assent. The intentions of both must concur. As where the goods were actually delivered into the possession of the consignee, who upon examination sent them back to the carrier with instructions to return them to the seller, who in turn refused to take them, by reason of which they were left in the carrier's hands as warehouseman, and it was contended that the goods remained in the hands of the carrier for the real owner who was the buyer; while it was admitted that the buyer was the real owner, it was held that the goods had never ceased to be *in transitu*, the intention of the buyer being a material fact, and that the carrier did not become his agent upon the return of the goods by him.²⁹ So where the consignee went on board the vessel, and said to the captain that he had come to take possession of his goods, and saw and touched them, but was told by the captain in the same interview that he would deliver him the goods when he was satisfied about his freight, whereupon the consignee left, and the vendor then went on board and gave notice of stoppage to the mate, it was held that no actual possession had been taken by the assignee, and that as the captain had not contracted to hold as his agent the *transitus* was not at an end, and the stoppage was good.³⁰

Delivery of goods to the store of the vendee which at the subject to the vendor's right of whether the transit had ended stoppage. A delivery by the carrier of part of the goods, therefore, when he is holding such goods for the purpose of securing unpaid freight charges, will not operate as a constructive delivery of the whole, unless the circumstances show that the carrier and buyer intended a partial delivery to so operate. *Jeffris v. Railroad Co.*, 93 Wis. 250, 57 Am. St. Rep. 919, 67 N. W. Rep. 424.

when the vendee, being unable to pay the freight, to save demurrage, was allowed by the railroad to unload the cars and pile the goods in its yard until he could pay the freight. *Rogers v. Schneider*, 13 Ind. App. 23, 41 N. E. Rep. 71.

29. *Bolton v. The Railway Co.*, 1 L. R. C. P. 431.

30. *Whitehead v. Anderson*, 9 M. & W. 518.

It is a question for the jury

time is in the possession of the sheriff,³¹ or a mortgagee,³² will not be considered a delivery to the consignee such as will defeat the vendor's right of stoppage.

Sec. 770. (§ 418.) When transit deemed to be ended.—The *transitus* will be considered as ended when the goods have been delivered at the consignee's own warehouse, or when they have been delivered at a place where the consignee intends them to remain until he, by his orders, gives them a further destination. So he may demand their delivery to himself at any point upon their journey, and thus put an end to the right of the vendor to stop them.³³ And if the carrier wrongfully refuse to deliver the goods upon the demand of the consignee, the *transitus* is at an end as soon as the demand is made and refused, and the right of stoppage is gone.³⁴ But it will not be terminated by an unauthorized demand on the carrier, with which he fails to comply.³⁵

Sec. 771. (§ 419.) Same subject.—It is held that if the buyer send his own cart or vessel for the goods, or receive them thereon for transportation, they will be considered as having reached his actual possession, unless the vendor restrain the effect of such delivery by taking a receipt or bill of lading, so expressed as to indicate that the delivery to the master of the vessel is to him as an agent for carriage, and not as an agent to receive possession for the buyer.³⁶ There are, however, cases which hold that so long as the property is merely on its way to the buyer, it may be stopped without reference to the mode of conveyance, and that the delivery to an agent of the vendee, though he may be the master of the vendee's

31. *Harris v. Tenney*, 85 Tex. 254, 20 S. W. Rep. 82, 34 Am. St. Rep. 796. *Secomb v. Nutt*, 14 B. Mon. 324; *Reynolds v. The Railroad*, 43 N. H. 580.

32. *Kingman v. Denison*, 84 Mich. 608, 48 N. W. Rep. 26, 22 Am. St. Rep. 711. 34. *Bird v. Brown*, 4 Exch. 786. 35. *Allen v. Mercier*, 1 Ash. 103; *Reynolds v. The Railroad*, 43 N. H. 580.

33. *Whitehead v. Anderson*, 9 M. & W. 518; *The London, etc. Railway v. Bartlett*, 7 H. & N. 400; 36. *Turner v. The Liverpool Docks Trustees*, 6 Exch. 543; *Van*

vessel, will not terminate the *transitus* where the object in view is the transportation of the property to its destination.³⁷

Sec. 772. (§ 420.) Not necessary that vendor obtain actual possession of goods—Notice is sufficient.—It was formerly held that, in order to make the stoppage *in transitu* effectual, the vendor must recover back the actual possession of the goods. But it is now settled that a demand made upon the carrier for them, or a notice to him to stop their delivery to the consignee, or an assertion of the vendor's right after an entry of the goods at the custom-house, or a claim and endeavor to get possession, is equivalent to an actual recovery of the goods into the vendor's possession. After such notice, the vendor will be considered as constructively in possession, and if the demand for their redelivery be refused, or if they be given up to another after such notice, the vendor may maintain trover against the carrier, or any other person, though it may be the buyer himself, into whose possession they have come. The title to the goods will still remain in the buyer as before, but the seller will be considered as put in the same position as to his lien that he held before he parted with them.³⁸

Sec. 773. (§ 421.) Duty and liability of carrier after notice.—The insolvency of the buyer is essential to the existence of the right of the vendor to stop the goods. If, therefore, the former be solvent at the time of its attempted exercise, the

Casteel *v.* Booker, 2 *id.* 691; *v.* Burns, 1 Iowa, 64; O'Neil *v.* Schotsmans *v.* The Railway Co., L. R. 2 Ch. App. 332. Garrett, 6 *id.* 480; White *v.* Welsh, 38 Penn. St. 396; Rowley *v.* Bige-

low, 12 Pick. 307; Rosenthal *v.* Weir, 170 N. Y. 148, 63 N. E. Rep. 65, 57 L. R. A. 527, *affirming* 66 N. Y. S. 841, 54 App. Div. 275. ^{37.} Stubbs *v.* Lund, 7 Mass. 453; Harris *v.* Pratt, 17 N. Y. 249; Harris *v.* Hart, 6 Duer. 606; Holbrook *v.* Vose, 6 Bosw. 76; Newhall *v.* Vargas, 13 Me. 93. ^{38.} Litt *v.* Cowley, 7 Taunt. 169; Bohtlingk *v.* Inglis, 3 East, 381; Northey *v.* Field, 2 Esp. 613; Mills *v.* Ball, 2 Bos. & P. 457; Newhall *v.* Vargas, 13 Me. 93; Jordan *v.* James, 5 Ham. 88; Wentworth *v.* Outhwaite, 10 M. & W. 436; Cox

Payment of the freight must be made to the carrier before the consignor can obtain possession of the goods under his right of stoppage *in transitu*. Pennsylvania Steel Co. *v.* Railroad Co., 94 Ga. 636, 21 S. E. Rep. 577.

carrier, if he know the fact, will be not only justified in refusing to give up the goods or to pay attention to the notice, but it would be his duty to do so. He obeys the order or demand at his peril in any case. For, while a rightful stoppage protects the carrier against the claims of the consignee,³⁹ yet if it should turn out that the purchaser of the goods was solvent, the notice or demand would be entirely without authority. If, therefore, the carrier refuse to give up the goods to the consignee, who is solvent, upon his demand, the latter might maintain an action of trover against him at once. If, on the other hand, the carrier fail to withhold the goods upon a notice to do so, or to surrender their possession to the vendor upon his demand, or if, after such notice or demand, he should deliver them to the buyer, and it should turn out that the latter was insolvent, the carrier will be liable to the vendor, at least to the extent of the buyer's indebtedness for the goods.⁴⁰ It has therefore been said that, "as the carrier obeys the stoppage *in transitu* at his peril, if the consignee be in fact solvent, it would seem no unreasonable rule to require that, at the time the consignee was refused the goods, he should have evidenced his insolvency by some overt act."⁴¹ But in the case of *The Tigress*⁴² this suggestion is rejected, the judge saying that the proof of the conditions on which the vendor's rights depend would always be difficult, often impossible, at the time of their exercise; "for instance, whether the vendee is insolvent may not transpire till afterwards, when the bill of exchange for the goods becomes due; for it is, as I conceive, clear law that the right to stop does not require the vendee to have been found insolvent."⁴³

Sec. 774. Same subject—Effect of agreed valuation in bill of lading when delivery made by carrier after notice.—Al-

39. *The Vidette*, 34 Fed. Rep. 396; *The E. H. Pray*, 27 Fed. Rep. 474.

40. *Allen v. Railroad Co.*, 79 Me. 327; *Bloomington v. Railroad Co.*, 6 Lea, 616; *Poole v. Railway Co.*, 58 Tex. 134.

41. *Blackburn on Sales*, 266.

42. 32 L. J. Adm. 97.

43. *Benjamin on Sales*, § 838.

And see authorities cited in last section.

though an agreed valuation may be given in the bill of lading in consideration of which a reduced freight rate is allowed, if the shipper gives notice to the carrier to stop the goods *in transitu*, and the carrier agrees to do so, he holds the goods as the shipper's, and the law creates a new relation to which the bill of lading has no reference. On a negligent delivery by the carrier, therefore, after notice from the shipper, the agreed valuation in the bill of lading will not control, but the shipper may show the real value⁴⁴ of the goods in an action for damages against the carrier.⁴⁴

Sec. 775. (§ 422.) Course to be pursued by carrier for his own protection.—The law of stoppage *in transitu*, therefore, becomes of great importance to the common carrier; and when a notice is given or a demand is made upon him for the goods by a vendor who claims the right to avail himself of it in the particular case, it places him in very nearly the same situation as when a demand is made for the goods by one who claims adversely to the bailor or his consignee. If it be doubtful whether the right exists to stop the goods, the carrier may, as in that case, instead of refusing to comply with the notice or the demand, require that he shall be allowed a reasonable time to investigate the condition of the buyer; and if, after inquiry, he shall be unable to satisfy himself, and does not choose to assume the responsibility of a delivery to either seller or buyer, or to act upon the demand of the vendor that the goods shall be withheld from the consignee, he may, for his own security, resort to legal proceedings to have the question determined, as in the case of adverse claimants of the property.⁴⁵

44. *Rosenthal v. Weir*, 170 N. Y. 527, *affirming* 66 N. Y. Supp. 841, 148, 63 N. E. Rep. 65, 57 L. R. A. 54 App. Div. 275.

45. *Ante*, § 752.

VIII. THE CARRIER'S RIGHT TO A RECEIPT ON DELIVERY.

Sec. 776. (§ 423.) Carrier may demand receipt on delivery.—

As nothing can be more reasonable than that when the carrier delivers the goods he should have the right to demand of the party receiving them some written evidence that he has done so, he may require a receipt in writing of the party, and it will be a good defense to an action for the goods that the consignee or other person claiming their delivery refused to give such receipt when required to do so.⁴⁶ And where the owner desires to remove the goods in separate parcels and at different times, the carrier may, as a condition of the delivery of a part of them, demand a receipt for the whole. After the owner has had an opportunity to inspect the goods and ascertain their condition, he is bound to take immediate custody of them and remove them with reasonable diligence, unless it is otherwise agreed between him and the carrier; and he cannot require the carrier to make more than one delivery or to take more than one receipt.⁴⁷

Sec. 777. (§ 423a.) But cannot require surrender of bill of lading.—So, though the carrier may properly require the *production* of the bill of lading by the consignee as evidence of his right to demand delivery of the goods,⁴⁸ it is said that the car-

46. *Skinner v. Railroad Co.*, 12 Iowa, 191.

A "clear" receipt by a consignee is a mere piece of evidence, and does not necessarily preclude him from afterwards proving that the goods were in fact damaged when received from the carrier. *Mears v. Railroad Co.*, 75 Conn. 171, 52 Atl. Rep. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192.

47. *Ayres v. Railroad Co.*, 5 Dutcher 393.

When it is shown that no cargo was used on a steamer and that

there was no opportunity for abstraction or loss during the voyage, the carrier is *prima facie* entitled to a receipt for the delivery of the entire cargo, notwithstanding a slight discrepancy in the recount at the point of delivery. *McLaren v. Standard Oil Co.*, 124 Fed. 958; *The Ethel*, 59 Fed. 473. See also, *The Minnie E. Kelton*, 109 Fed. 164, 48 C. C. A. 271.

48. *Bass v. Glover*, 63 Ga. 746; *Sellers v. Railway Co.*, 123 Ga. 386, 51 S. E. Rep. 398, citing *Hutch. on Carr.*

rier cannot insist upon the *surrender* of the bill of lading as a condition of delivery.⁴⁹ But even the *production* of the bill of lading may be waived by the carrier if he bases his refusal to deliver solely on some other ground than its non-production.⁵⁰

49. *Dwyer v. Railway Co.*, 69 Tex. 707.

Under a New York statute it is practically made the duty of the carrier to require the surrender or cancellation of the bill of lading, or to write "Not negotiable" across its face on delivery to the consignee. *Mairs v. Railroad Co.*, 175 N. Y. 409, 67 N. E. Rep. 901, *affirming* 76 N. Y. Supp. 838, 73 App. Div. 265.

The assignment of a "spent" bill of lading by the consignee does not operate to pass title to the goods, and the assignee of a

"spent" bill of lading cannot recover from the carrier for a conversion of the goods in delivering them to the consignee without the surrender of the bill of lading, even though the bill of lading requires the carrier to take up such bill on the delivery of the goods. *National Commercial Bank v. Transportation Co.*, 69 N. Y. Supp. 396, 59 App. Div. 270; *affirmed*, 172 N. Y. 596, 64 N. E. Rep. 1123.

50. *Clegg v. Railroad Co.*, 135 N. C. 148, 47 S. E. Rep. 667, 65 L. R. A. 717.

CHAPTER X.

OF THE RIGHTS OF THE CARRIER.

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| <p>§ 871. Lien not lost by delivery obtained by trick or fraud.</p> <p>872. Lien takes precedence of claims of consignor or creditors.</p> <p>873. Rights of conditional vendor who authorizes shipment of goods.</p> <p>874. Lien lost where carrier is liable for damages to goods equal to or exceeding the freight charges.</p> <p>875. Lien may be waived by terms of payment.</p> <p>876. Same subject—Waiver by taking acceptance payable after delivery.</p> <p>877. Same subject—What does not amount to a waiver.</p> <p>878. Same subject—Other illustrations.</p> <p>879. Same subject—Other illustrations.</p> | <p>§ 880. Carrier may store goods subject to lien when consignee fails or refuses to pay freight.</p> <p>881. Liability of carrier while so holding goods.</p> <p>882. Whether the carrier has a lien upon goods wrongfully shipped by one who is not the owner.</p> <p>883. Same subject—How compares with innkeeper.</p> <p>884. Same subject—No lien where goods received from tortious holder.</p> <p>885. Same subject—Lien exists where goods received from one clothed with apparent authority by owner.</p> <p>886. Whether property of government subject to lien.</p> <p>887. Lien discharged by tender.</p> <p>888. Lien not assignable.</p> <p>889. Carrier cannot sell the goods for his charges.</p> |
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Sec. 778. (§ 424.) In general.—Thus far the subject of the common carrier's relation to the goods intrusted to him has been treated, almost exclusively, with reference to his duties and responsibilities growing out of that relation. But the law will imply no executory contract which imposes upon one party duties and obligations without some equivalent; and even when the contract is expressed by the parties, much is still generally left to be settled by legal implication. This equivalent in the case of the carrier, it is true, consists mainly in the compensation which is allowed him for the carriage of the goods, for which a lien is given him upon them. But besides the payment of such compensation, the law further imposes upon the bailor certain duties and obligations to the carrier which give rise to corresponding rights on the part of the latter against his bailor. And as a means of protection against the consequences to himself of the extraordinary risks which it imposes upon him, and also that he may protect the inter-

est of his employer in the property in his custody, the law has further conferred upon him certain rights as against all those who may unlawfully interfere with him or the goods in his charge whilst he is engaged in the performance of his duty.

I. GENERAL RIGHTS IN RESPECT TO THE GOODS.

Sec. 779. (§ 425.) The carrier's right to an action to recover the goods when taken from him or for an injury to them while in his custody.—Being a bailee of the goods for hire, and having a further interest in them by reason of the responsibility which rests upon him, he has what is called a special property in them which will justify him in resorting to any means for their protection to which the general owner could have recourse; and if they suffer damage from the negligence or wilful wrong of another, he may recover from the party in fault damages for the injury sustained by them,¹ even to the extent of their full value, if they be destroyed or rendered valueless by such negligence or wrong. Or if they be wrongfully taken from him, he may recover his possession or the value of the goods, in the appropriate action of detinue, replevin or trover. He is, in short, for all practical purposes, the owner of the property for the redress of all wrongs or injuries to it whilst in his possession; for, as has been well said, a man ought not to be charged with an injury to another without being able to resort to the original cause of that injury, and in amends there to do himself right.² And of so much consequence does the law esteem his temporary and qualified

1. The Gen. McCullom, 9 Benedict, 31; State v. Liquors, 83 Me. 158, 21 Atl. Rep. 840. field, 158 U. S. 303, 15 Sup. Ct. R. 860, 39 L. Ed. 993.

2. Story on Bail. § 93f.

"It is perfectly well settled that the carrier is so far the representative of the owner that he may sue in his own name, either at common law or in admiralty, for a trespass upon or injury to the property carried." The Beacons-

But if a carrier is induced by fraud to deliver goods to a third person on his payment of the freight charges, he cannot recover possession without reimbursing such person for the amount paid as freight charges. Walker v.

ownership of the property that, even in criminal prosecutions for theft or robbery, it is held to be sufficient to allege such ownership of the property in the indictment, without reference to its general owner.³

Sec. 780. (§ 426.) Owner's right of action, how affected—Extent of carrier's recovery.—Nor is the right thus conferred by his special property inconsistent with a co-existing right of action for the same cause in the general owner.⁴ But even when the real owner might sue, the action may still be brought in the name of the carrier, though the object of the suit may be a recovery for the full value of the goods, and a recovery by him will be a bar to any subsequent action by such general owner.⁵ But in case the carrier should recover the full value, he will be entitled to the recovery only to the extent of his qualified interest in the goods, and as to the balance he will be held to be a trustee for the general owner unless he has satisfied such owner for his loss. The law will regard the damages in such cases as standing in the place of the property for the conversion or destruction of which they have been recovered.⁶ And when a judgment recovered by either has been satisfied, it will pass the title to the property, for the injury to which it was recovered, to the party against whom the recovery was had.⁷

Sec. 781. (§ 427.) When carrier may be subrogated to owner's claim.—But if the property intrusted to the carrier be lost or destroyed whilst in his charge by the wrongful act or care-

Railroad Co., 111 Ala. 233, 20 So. Cow. 670; *Lyle v. Barker*, 5 Bin. Rep. 358. 457.

3. *White v. Bascom*, 28 Vt. 268; 6. *Chesley v. St. Clair*, 1 N. H. 189; *Harker v. Dement*, 9 Gill, 7; *Bishell v. Huntington*, 2 *id.* 142; *Steamboat Farmer v. McCraw*, 26 Ala. 189; *Woodman v. Nottingham*, 49 N. H. 387.

4. *Booth v. Terrell*, 16 Ga. 20; 7. *Strong v. Adams*, 30 Vt. 221; *Morgan v. Ide*, 8 Cush. 420. *Ely v. Ehle*, 3 Comst. 506; *Root v. Chandler*, 10 Wend. 110; *Spence v. Mitchell*, 9 Ala. 744; *Hart v. Hyde*, 5 Vt. 328; *Bryant v. Clifford*, 13 Met. 138; *Overby v. Mc-*

5. *Ingersoll v. Van Bokkellin*, 7

lessness of another, and the carrier pay to the owner its value, which is accepted in full satisfaction of his loss, he will be substituted to all the rights of such owner, and may recover such value from the wrong-doer for his own use and benefit. And even when the property is destroyed by the wanton and unauthorized act of his servant or agent, not done in the performance of his appointed duties, the carrier may, upon making amends to the owner, be entitled to any action or recovery to which such owner might have been entitled against any other person than the wrong-doer; as, for instance, if a chose in action be intrusted to him for carriage, and be entirely lost or destroyed by the wilful misconduct of an agent, the carrier, upon payment of its value to his bailor, will be treated as an equitable assignee of such bailor for valuable consideration, and as entitled to all the remedies which the latter would have had against the party liable to an action thereon. Thus, where bank-notes were delivered to the carrier, and one of his agents, in gross violation of his duty, purloined and actually destroyed them, it was held that the carrier, upon making satisfaction to the owner, might recover their value from the bank by which they were issued.⁸

Sec. 782. (§ 428.) Right of carrier to recover possession of goods from owner.—And not only may the carrier sue and recover from a stranger or third person who may have taken the goods tortiously from his possession, or occasioned damage to them, but he may also have an action against the bailor or owner himself, even for the recovery of the possession of the goods, if they have been taken from him by the latter unlawfully and in violation of his right to their custody. For if the carrier has a lien upon the goods for his freight or for charges advanced upon them, if they are taken from him, even by the owner himself, against his will, he will be entitled to a restitution of them and may have his action for that purpose. In such a case, he is in a position similar to that of a pawnee

Gee, 15 Ark. 459; Lovejoy v. Mur- Adams Express Co., 45 Pa. St.
ray, 3 Wall. 1. 419.

8. Hagerstown Bank v. The

who has the goods of his bailor pledged to him for his security, and who is therefore clearly entitled to be restored to his possession when deprived of it without his consent or the payment of his debt.⁹ So if, after the carrier has agreed to attorn to and to keep the goods for an adverse claimant who has the paramount title to them, they be taken from him forcibly or against his will by his bailor, he could undoubtedly sustain an action for a recovery of the goods or their value. But if the action be founded solely upon the special property of the carrier as bailee, and, instead of seeking a restitution of the goods to his possession, he sue in trespass or trover for damages only, his recovery against the bailor or general owner will be limited to the value of his special interest in the goods.¹⁰

Sec. 783. (§ 429.) His right to insure the goods.—The common carrier may also, in common with all bailees intrusted for hire with the custody of property, and responsible for its safety, insure the goods delivered to him for carriage,¹¹ not only to the extent of the value of his interest in them, but to their full value, upon the ground that every person who would be liable in the event of the loss of property may affect an insurance for his own protection. And whether responsible or not by the terms of his receipt or bill of lading for a loss arising from a particular risk, he may still insure, for the benefit of

9. Story on Bail. § 303; *Young v. Kimball*, 23 Pa. St. 193; *Van Baalen v. Dean*, 27 Mich. 104.

10. *White v. Webb*, 15 Conn. 302; *Hays v. Riddle*, 1 Sand. 248; *Hickok v. Buck*, 22 Vt. 149; *Little v. Fossett*, 34 Me. 545; *Benjamin v. Strempfle*, 13 Ill. 466; *Young v. Kimball*, 23 Pa. St. 193.

11. *Insurance Co. v. Railway*, 63 Tex. 475.

"No rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in

goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants. By obtaining insurance, he does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility." *Phoenix Ins. Co. v. Erie & W. Trans. Co.*, 117 U. S. 322, 6 Sup. Ct. R. 755. Quoted approvingly in *Willock v. Railroad Co.*, 166 Pa. St. 184, 30 Atl. Rep. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228.

the owners of the goods, against loss therefrom, as well as against all other risks. But when there is no responsibility, as where the bill of lading excepts liability from losses by fire or the perils of the sea, and the carrier would insure against them, not exclusively the value of his own interest in the goods, but to the extent of their full value, it must appear from the use of the words, "for whom it may concern," or some other equivalent expression, that it was his intention to insure for the benefit of the owners, and not for himself exclusively.¹² And not only may the carrier procure insurance upon the specific goods of his employer intrusted to him for carriage in this manner to their full value, but he may procure a floating or shifting policy, which will attach to the goods as they may from time to time come into his custody in the course of his business.¹³ But whenever his insurance is made to cover the full value of the goods, he will be held to be a trustee for the owners of the goods for the amount, after deducting the value of his own interest for advances upon them and his freight.¹⁴ The money received upon such a policy is considered as supplying the place of the lost goods.

12. 1 Phillips on Ins. § 383.

As the implied authority of an agent, in the absence of notice to the contrary, is the measure of his apparent authority, an inducement held out in his literature by a general agent of a steamship company that insurance on goods was free when the value was declared before sailing does not charge a shipper, having knowledge of such literature, with notice that the agent has no authority to insure goods without such valuation. *Lowenstein v. Lombard*, *Ayres & Co.*, 164 N. Y. 324, 58 N. E. Rep. 44, reversing 45 N. Y. Supp. 286, 17 App. Div. 408.

13. 2 Duer on Ins. 49; *Waring v. Insurance Co.*, 45 N. Y. 606; *Waters v. The Monarch Ins. Co.*,

5 El. & B. 870; *London, etc., Railway v. Glyn*, 1 El. & El. 652; *Marks v. Hamilton*, 7 Exch. 323; *Savage v. Corn Ex. Ins. Co.*, 4 Bosw. 1, 36 N. Y. 635; *Crowley v. Cohen*, 3 B. & Ad. 478; *Wolff v. Horncastle*, 1 B. & P. 316; *Caruthers v. Sheddon*, 6 Taunt. 14; *Van Natta v. Insurance Co.*, 2 Sandf. 490; *Chase v. Washington Ins. Co.*, 12 Barb. 595; *Miltenberger v. Beacom*, 9 Penn. St. 198; *Vermont, etc., R. R. v. Fitchburg, etc., R. R.*, 14 Allen, 462; *Eastern R. R. v. Insurance Co.*, 98 Mass. 420; *Commonwealth v. Insurance Co.*, 112 *id.* 136.

14. *Stilwell v. Staples*, 19 N. Y. 401; *Waters v. The Monarch Ins. Co.*, *supra*; *Pennefeather v. Baltimore, etc., Co.*, 58 Fed. 481;

Sec. 784. Same subject—Insurance by shipper for carrier's benefit.—The carrier may contract with the shipper for the benefit of any insurance which the latter may effect upon the goods, and if the goods are lost under circumstances which would make the insurer liable, the carrier may pay the owner of the goods and recover from the insurer,¹⁵ unless the insurer has guarded against such a contingency by inserting some such protective clause in the policy as that he would be liable only for what could not be collected from the carrier.¹⁶ But the carrier cannot insist, as a condition of receiving the goods for carriage, that they shall be insured for his benefit by the shipper; and if a bill of lading "contained a provision that the [carrier] would not be liable unless the owners should insure for its benefit, such provision could not be sustained, for that would be to allow the carrier to decline the discharge of its duties and obligations as such, unless furnished with indemnity against the consequences of failure in such discharge.

Home Ins. Co. v. Railway Co., 71 Minn. 296, 74 N. W. Rep. 140.

15. *Mercantile Mutual Ins. Co. v. Calebs*, 20 N. Y. 173.

See also, *Roos v. Railroad Co.*, 199 Pa. 378, 49 Atl. Rep. 344 (suit by a shipper against carrier. Carrier held entitled to a deduction for insurance paid to shipper).

So the carrier may contract with a compress company for the insurance of cotton for his benefit, and in such case he will be entitled to recover from the insurer. *Merchants' Cotton Press Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 Sup. Ct. R. 367, 38 L. Ed. 195, affirming 91 Tenn. 537, 19 S. W. Rep. 755.

The act of a consignor in giving up insurance on the goods in his favor and taking out a policy in favor of the carrier, fully protecting it from loss or destruction

by fire, constitutes a valuable consideration for a promise on the part of the carrier not to insist on a provision in the bill of lading exempting it from liability for loss or damage by fire. *Railway Co. v. Cau*, 120 Fed. 15, 645, 57 C. C. A. 35.

16. *Railroad Co. v. Burr*, 130 Fed. 847, 65 C. C. A. 331. In this case the court also held that when a carrier refuses to be liable himself for the destruction through its own negligence of part of the value of the goods it carries by requiring the damage to be ascertained on the basis of the cash value of the goods at the original port of shipment at the time of shipment rather than on the basis of their value at the port of destination at the time they should be delivered, it may fairly be held that a prudent man is

Refusal by the owners to enter into a contract so worded would furnish no defense to an action to compel the company to carry, and submission to such a requisition would be presumed to be the result of duress of circumstances and not binding.'¹⁷

thus required to insure that part, and the carrier cannot be allowed to take the benefit of the insurance taken on that part. A clause in the bill of lading giving it the benefit of insurance effected by the shipper can only be sustained as to such insurance, or as to so much of the insurance as represents the goods and the value for which in case of loss the carrier is to respond. If the assured is required to yield up to the carrier the insurance covering difference in value between port of shipment and port of discharge, the bill of lading by one clause relieves the carrier from reimbursing the merchant for the full value of his goods, while an associated clause prevents the merchant from securing such reimbursement through the channels of insurance.

17. *Inman v. The Railway*, 129 U. S. 128; *The Seaboard*, 119 Fed. 375; *St. Mary's Creamery Co. v. Railway Co.*, 8 Ont. L. R. 1, 3 Canadian Ry. Cases, 447, *affirming* 5 Ont. L. R. 742, 2 Canadian Ry. Cases, 122; *Willock v. Railroad Co.*, 166 Pa. St. 184, 30 Atl. Rep. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228.

Inman v. The Railway, 129 U. S. 128, is an interesting case in this connection. Here the carrier received cotton for transportation, giving the owner, the plaintiff, a bill of lading, received and accepted by him, which contained a

clause providing that the carrier "should have the benefit of any insurance which may have been effected upon or on account of said cotton." The cotton was destroyed by fire while in the carrier's possession. Previous to the shipment the owner had taken out policies of insurance against loss by fire upon the cotton. These policies all provided for the transfer of the owner's claim against the carrier to the insurer on payment of the loss. Some of the policies contained provisions forfeiting the insurance in case any agreement was made by the insured whereby the insurer's right to recover of the carrier was released or lost. The insurance companies did not pay the loss, but a stipulation was entered into between the insurers and the insured whereby the amount of the loss was agreed upon, and the insured was to proceed against the carrier for the lost goods. This attempt to recover from the carrier, however, was not to prejudice the claim of the insured against the insurers.

The insured sued the carrier and was defeated in the circuit court, the court charging substantially that the plaintiff must show that he had given the carrier the benefit of his insurance before he could recover. Also, that if the jury found that an agreement had been made between the plaintiff and the insurers, by

In the absence of any contract by the carrier with the shipper for the benefit of any insurance which the latter may effect upon the goods, the insurer may, if the carrier be liable for the loss, by suit in the name of the owner recover from the

which the insurers waived proof of the loss and admitted the claim of plaintiff to be due, but that plaintiff agreed to first press the claim against the carrier, then plaintiff could not recover.

There was a reversal in the supreme court, Fuller, C. J., after announcing the doctrine in the text, saying:

"But the clause in question bears no such construction, and obviously cannot be relied on as in itself absolving the company from liability, for by its terms the benefit of the insurance was only to be had when a legal liability had been incurred, and in favor of the company incurring such liability. Since the right to the benefit of insurance at all depended upon the maintenance of plaintiff's cause of action, the fact of not receiving such benefit could not be put forward in denial of the truth or validity of their complaint.

"If, on the other hand, the contention of the defendant may be regarded as in the nature of a counter-claim by way of recoupment or set-off, then the question arises as to the extent of the stipulation, assuming it to be otherwise valid, and what would amount to a breach of it.

"By its terms the plaintiffs were not compelled to insure for the benefit of the railroad company; but if they had insurance at the time of the loss, which they could

make available to the carrier, or which, before bringing suit against the company, they had collected without condition, then, if they had wrongfully refused to allow the carrier the benefit of the insurance, such a counter-claim might be sustained, but otherwise not.

"The policies here were all taken out before the shipments were made, although, of course, they did not attach until then, and recovery upon neither of them could have been had, except upon condition of resort over against the carrier, any act of the owners to defeat which operated to cancel the liability of the insurers. They could not, therefore, be made available for the benefit of the carrier. Nor have the insurance companies paid the owners. It is true that, after the loss had been incurred, the companies signed certain memoranda, by which the face of the insurance was reinstated, proofs of loss waived, and provision made for postponing the question of indemnity, until the owners, if the carrier refused to pay, had used effort to collect, without prejudice to the owners' claims against the insurance companies. But this falls far short of the equivalent of payment, and, indeed, under the terms of these policies, payment itself would have been subject to such conditions as the companies chose to impose. Although in the order of

carrier the amount which the insurer has paid to the owner for the loss of the goods whilst in the custody of the carrier.¹⁸

Sec. 785. (§ 430.) His authority to sell the goods.—The bailment to the carrier confers no authority whatever upon

ultimate liability that of the carrier is in legal effect primary and that of the insurer secondary, yet the insured can, in the absence of provisions otherwise controlling the subject, insist upon proceeding, under this contract, first, against the party secondarily liable, and when he does so is bound in conscience to give to the latter the benefit of the remedy against the party principal; but these insurers could, under their contracts, require the owners to pursue the carrier in the first instance, and decline to indemnify them until the question and the measure of the latter's liability were determined. This they did, and to their action in that regard the defendant is not so situated as to be entitled to object."

18. In *Hall v. The Railroad Companies*, 13 Wall. 367, the question was, upon demurrer, whether the underwriter who insures against loss by fire, and pays the insurance upon a loss by accidental burning of the goods while in transit, could bring an action in the name of the owner for his use against the carrier based upon its common-law liability. "It is too well settled by the authorities," said Strong, J., "to admit of question, that, as between the common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while

the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence, it has often been ruled that an insurer who has paid a loss may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss." *Louisville, etc., Railroad v. Manchester Mills*, 88 Tenn. 653, 14 S. W. Rep. 314.

And an insurer against loss by fire, subrogated for the insured by reason of payment of the pol-

him to sell the goods, and if he sell them without other authority than that which he has as carrier he can pass no title. And though the goods be sold for a fair price to one who purchases in good faith, the title of the owner is not affected by the sale, and the purchaser will be responsible to him for them.¹⁹ This rests upon the well established rule of law, applicable to all bailees, that no one can sell the property of another, so as to vest a title in the purchaser, without authority to do so from the owner, although he may have possession, which is *prima facie* evidence of title, by the permission of the owner or even by his procurement, no matter how innocent the purchaser may have been or how good apparently was the right of the seller to make the sale; the universal and fundamental principle of the law of personal property being, that no man can be divested of his title to it without his own consent, and consequently that even the honest purchaser under a defective title cannot hold against the true owner. That "no one can transfer to another a better title than he has himself" is a maxim, says Chancellor Kent, alike "of the common and civil

icy, may, in a suit against the common carrier, brought in the name of the insured for the value of the goods insured, recover the full amount of the loss or damage without regard to the amount of the policy. *Mobile, etc., R'y v. Jurey*, 111 U. S. 584. See also, *Insurance Co. v. Morse*, 150 U. S. 99, 14 Sup. Ct. R. 55, 37 L. Ed. 1013.

An insurer must recover from the carrier, if at all, upon the shipper's right, and upon that alone, and the insurer's own declarations and admissions are immaterial. *Judd & Root v. Steamship Co.*, 128 Fed. 7, 62 C. C. A. 515; *id.* 117 Fed. 206, 54 C. C. A. 238; *id.* 130 Fed. 991.

19. *White v. Webb*, 15 Conn. 302; *Doané v. Russell*, 3 Gray,

382; *Agnew v. Johnson*, 22 Penn. St. 471; *Hunt v. Haskell*, 24 Me. 339; *Kitchell v. Vanadar*, 1 Blackf. 356; *Hoffman v. Noble*, 6 Met. 68; *Rankin v. Packet Co.*, 9 Heisk. 564; *Hartop v. Hoare*, 1 Wils. 8; *McCombie v. Davies*, 6 East, 538; *Bailey v. Shaw*, 24 N. H. 297; *Swift v. Moseley*, 10 Vt. 208; *Lecky v. McDermott*, 8 S. & R. 500; *Powell v. Buck*, 4 Strob. Law, 427; *Lickbarrow v. Mason*, 6 East, 21.

And if an innocent purchaser from the bailee, who has sold the goods without authority from the bailor, disposes of them to another, he will be liable to the bailor for their value. In such a case the rule that where one of two innocent persons must suffer, the loss should fall on him

law, and a sale *ex vi termini* imports nothing more than that the *bona fide* purchaser succeeds to the rights of the vendor.”²⁰

Sec. 786. (§ 431.) Same subject—Cannot sell to satisfy lien.

—Nor does the fact that the carrier has a lien upon the goods, for his freight or on any other account, confer upon him the right to sell them to satisfy his charges or to reimburse himself for expenses incurred by him for the owner on their account. And if the consignee refuse to pay the freight and to receive them the carrier must store them with some responsible warehouseman, subject to his lien, and, unless the lien is discharged by the owner, must resort to legal proceedings to have them sold, and the proceeds applied to the payment of his claim.²¹ If, in such cases, the goods be stored in a warehouse not belonging to the carrier, the warehouseman will hold them under the authority of the carrier and not of the owner, and his possession will be regarded as that of the carrier for the purpose of preserving his lien; and the goods will become subject to the lien of the warehouseman as well as to that of the carrier.²²

Sec. 787. (§ 432.) Same subject—When sudden emergency will justify sale.—But while in the possession of the goods in the character of carrier, he also stands for many purposes in the relation of agent for the owner; and it is a general rule of law that, although the powers of agents are ordinarily limited to the purposes for which they are employed, yet that emergencies may arise in which, from the necessities of the case, an agent may be justified in assuming extraordinary powers; and that his acts, done fairly and in good faith under such circumstances, though entirely beyond the scope of his ordinary

whose act or omission made it possible, does not apply. *Miller* 21. *Briggs v. The Railroad*, 6 *Allen*, 246; *Hunt v. Haskell*, 24 *Piano Co. v. Parker*, 155 Pa. St. Me. 24; *Indianapolis, etc., R. R.* 208, 35 Am. St. Rep. 873. *v. Herndon*, 81 Ill. 143; *Rankin v.*

20. 2 Kent's Com. 324; *Saltus v. The Packet Co.*, 9 Heisk. 564, and cases *supra*.

Everett, 20 Wend. 269; *Covill v. Hill*, 4 Denio, 323; *Pickering v. 22. Western Trans. Co. v. Bar-* *Busk*, 15 East, 38; *Coggill v. The* *ber*, 56 N. Y. 544.
Railroad, 3 Gray, 545.

powers, may be binding upon his principal.²³ Such emergencies sometimes occur, in the course of the business of the carrier, in which he becomes the agent of all concerned, and in which his acts, in the exercise of a sound discretion, will be binding upon all the parties in interest; and, if the necessities of the case require that the goods be sold, he not only may sell, but it becomes obligatory upon him to do so, for the benefit of the owner. If, for instance, the consignee refuse to accept the goods, and they are of a perishable character, and if stored would, from rapid decay, be totally lost to the owner, it would be the duty of the carrier to sell them on his account; and the same rule would apply if, from any cause, it became impossible to deliver the goods according to the directions of the owner or bailor, or to return them before they would inevitably perish from such inherent tendency, from damage received by them in the transit, or from any other cause.²⁴

Sec. 788. (§ 433.) Same subject—Absolute necessity will justify.—So in the case of carriers by sea the master of the vessel is vested by law with power to sell the goods of the shippers of the cargo in case of absolute necessity, as where there is a total inability to carry the goods to their destination or otherwise to obtain money indispensable to make the necessary repairs to complete the voyage, and no other vessel can be procured to which they can be transshipped for the intended port, or where the goods, in case of accidental delay, are about to perish, or have become so far damaged as to be unfit for further carriage. In such cases of absolute necessity he may sell both ship and cargo, and the purchaser will acquire an absolute title.²⁵

23. Mechem on Agency, § 481.

24. *Arthur v. The Schooner Cas-*
sius, 3 Story, 81; *Rankin v. Pack-*
et Co., 9 Heisk. 564; *Hull v. Rail-*
road Co., 60 Mo. App. 593; *Dudley*
v. Railway Co., — W. Va. —, 52 S. E. Rep. 718, citing *Hutch-*
inson on Carr.

25. *Pope v. Nickerson*, 3 Story, 465; *Post v. Jones*, 19 How. 150; *The Gratitude*, 3 Rob. Adm. 240; *Freeman v. E. India Co.*, 5 B. & Ald. 617; *Vlierboom v. Chap-*
man, 13 M. & W. 230; *Cannan v. Meaburn*, 1 Bing. 243; *Cammell v. Sewell*, 3 H. & N. 617, 5 *id.*

Sec. 789. (§ 434.) Same subject—The rule stated.—The law upon the subject of sales by carriers in cases of necessity is thus stated by Cockburn, C. J., in *Notara v. Henderson*:²⁶ “The law applicable to such a case appears to us to be free from any serious difficulty. In every contract to carry for freight there is an implied obligation on the part of the ship-owner that, in the event of any disaster happening to the ship or cargo in a port where correspondence cannot be had with the freighter, the master shall act as his agent and use his best efforts for the protection and preservation of the cargo. He must, in such an emergency, put himself in the place of the owner of the cargo and do what the latter, as a prudent man, would himself do for his own interest if he were present. ‘If the cargo,’ says Lord Stowell, in the case of *The Gratitude*,²⁷ ‘is a perishable cargo, and the vessel is unable to proceed or stands in need of repairs to enable her to proceed in time, . . . the master must exercise his judgment whether it would be better to transship the cargo, if he has the means, or to sell it. He is not absolutely bound to transship; he may not have the means of transshipment. But even if he has, he may act for the best in deciding to sell. If he had not the means of transshipping, he is under an obligation to sell, unless it can be said that he is under an obligation to let it perish.’ ”

Sec. 790. (§ 435.) Same subject—What purchaser must show.—In order to justify the act of the carrier in making a sale of the goods, and to establish his title to them, the purchaser must show that there was a necessity for the sale, arising from the perishable nature of the property, which made its preservation for the owner impracticable, or that, from that or some other cause, it was neither possible to proceed with its transportation nor to store it; that the carrier has acted in good faith and with sound discretion; and that it was impossible to communicate with the owner and to receive instructions from him as to the course to be pursued, without occasioning a delay

728; *Propeller Mohawk*, 8 Wall.

26. L. R. 5 Q. B. 346.

153; *The Velona*, 3 Ware, 139;

27. 3 Rob. Adm. 259.

The Brewster, 95 Fed. 1000.

which the circumstances and condition of the property would not admit.²⁸ And whether, under all the circumstances, these conditions existed to justify the sale, is, when the action is one at law, a question of fact to be determined by the jury under proper instructions by the court.²⁹

Sec. 791. (§ 436.) Same subject—Sale when not necessary amounts to a conversion.—If the carrier or the master of the vessel sell the goods when the necessity for so doing does not exist, he will be liable in an action for their conversion, and nothing but the existence of circumstances of actual necessity will afford an excuse for the sale. Neither the advice of others who are called upon to examine the goods, nor the decree of a court having no jurisdiction or authority to order a sale under such circumstances, will be any justification to the carrier or any protection to the purchaser, if it appear that a case of necessity did not require the sale.³⁰ And in the case of an unjustifiable sale by the master, the owners of the vessel will also be liable to the shipper.³¹

Sec. 792. (§ 437.) Same subject—What degree of necessity must be shown—Necessity for communication with owner.—The degree of necessity which must exist in such cases to justify the sale is generally expressed by the words “supreme,” “urgent,” or “absolute.” This is assuming that there are different degrees of necessity, the highest of which is necessary to justify a sale by the carrier. If, therefore, according to these expressions, there be any possible manner of preserving the goods short of their sale, it must be resorted to; otherwise

28. *Butler v. Murray*, 30 N. Y. 88; *The New Eng. Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387; *Bryant v. Ins. Co.*, 13 Pick. 543; *Am. Ins. Co. v. Center*, 4 Wend. 45; *Hall v. Franklin Ins. Co.*, 9 Pick. 466; *Wilson v. Millar*, 2 Starkie, 1; *Saltus v. Everett*, 20 Wend. 267; *Myers v. Baymore*, 10 Penn. St. 114.

29. *Butler v. Murray*, *supra*.

30. *Cannan v. Meaburn*, 1 Bing. 243; *Myers v. Baymore*, 10 Penn. St. 114; *Smith v. Martin*, 6 Binney, 262; *Ewbank v. Nutting*, 7 Com. B. 797; *Freeman v. The E. India Co.*, 5 B. & Ald. 617; *Wilson v. Dickson*, 2 *id.* 2.

31. *Cannan & Meaburn*, 1 Bing. *supra*; *Smith v. Martin*, *supra*; *Ewbank v. Nutting*, *supra*.

there will exist neither the authority to sell nor a title in the purchaser. But it has been said with great force that "the word necessity, when applied to mercantile affairs, where the judgment must, in the nature of things, be exercised, cannot of course mean an irresistible compelling power. What is meant by it in such cases is, the force of circumstances which determine the course a man ought to take. Thus when, by the force of circumstances, a man has the duty cast upon him of taking some action for another, and under that obligation adopts the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency, it may properly be said of the course so taken that it was, in a mercantile sense, necessary to take it."³² And in the same case it is said, in reference to the necessity for awaiting instructions from the owner, that "the possibility of communicating with the owners must, of course, depend on the circumstances of each case, involving the consideration of the facts which create the urgency for an early sale, the distance of the port from the owners, the means of communication which may exist, and the general position of the master in the particular emergency. Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it could be obtained before the sale. When, however, there is ground for such an expectation, every endeavor, so far as the condition in which he is placed will allow, should be made by the master to obtain the owner's instructions." In a case³³ in the federal courts it is said: "If the owner is at hand and can be easily communicated with, the master must advise the owner of the facts and take his directions; and where such directions may be obtained, there is neither necessity nor authority nor justification for the master to assume to sell or to hypothecate without notice."

32. *The Australasian S. N. Co. v. Huth*, 16 Ch. Div. 474; *Hall v. ads. Morse*, L. R. 4 P. C. Cas. 222. *Insurance Co.*, 37 Fed. Rep. 371. See also, *Acatos v Burns*, 3 Exch. 33. *Astrup v. Lewy*, 19 Fed. Div. 282; *Atlantic Mut. Ins. Co. Rep.* 536, citing *The Julia Blake*,

Sec 793. (§ 438.) Same subject—Sale must be made where market and competition exist.—Besides the three requisites of necessity, sound discretion, and communication with the owner when practicable, it must also appear that the sale was made where there were a market and competition, and buyers with the means of purchasing. This rule has been applied in the case of a wreck in a distant ocean, where the property was derelict, or about to become so, and the persons who had it in their power to save the crew and cargo preferred to drive a bargain with the master, by which they claimed to have become owners of the cargo, for a consideration merely nominal. The necessity in such a case, it was said, may be imperative, because it is the price of safety, but it is not of that character which permits the master to exercise the power of sale which belongs to him in certain cases of absolute necessity; and the pretended claimants, under the sale, were treated as mere salvors, and were allowed only for salvage and freight.³⁴

107 U. S. 418. See also, *Moore v. Hill*, 38 Fed. Rep. 330; *The Joseph Oteri, Jr.*, 66 Fed. 581, 13 C. C. A. 645, 30 U. S. App. 1.

34. *Post v. Jones*, 19 How. 150.

The following is an extract from the opinion of Grier, J., in this case: "As many of the circumstances attending this case are peculiar and novel, it may not be improper to give a brief statement of them. The *Richmond*, after a ramble of three years on the Pacific in pursuit of whales, had passed through the sea of Anadin, and was near Behring's straits, in the Arctic ocean, on the 2d of August, 1849. She had nearly completed her cargo, and was about to return; but, during a thick fog, she was run upon rocks within half a mile of the shore, and in a situation from which it was impossible to extricate her. The master and crew

escaped in their boats to the shore, holding communication with the vessel without much difficulty or danger. They could have probably transported the cargo to the beach, but this would have been unprofitable labor, as its condition would not have been improved. Though saved from the ocean, it would not have been safe. The coast was barren; the few inhabitants, savages and thieves. This ocean is navigable for only about two months in the year; during the remainder of the year it is sealed up with ice. The winter was expected to commence within fifteen or twenty days, at farthest. The nearest port of safety and general commercial intercourse was at the Sandwich Islands, five thousand miles distant. Their only hope of escape from this inhospitable region was by means of other whaling ves-

Sec. 794. (§ 438a.) Same subject—Cannot give away the goods.—It follows clearly from the foregoing considerations that while the master of a stranded vessel may, in case of urgent necessity, throw overboard or otherwise sacrifice his

sels, which were known to be cruising at no great distance, and who had been in company with the *Richmond*, and had pursued the same course.

"On the 5th of August the fog cleared off, and the ship *Elizabeth Frith* was seen at a short distance. The officers of the *Richmond* immediately went on board, and the master informed the master of the *Frith* of the disaster which had befallen the *Richmond*. He requested him to take his crew on board, and said, 'you need not whale any more; there is plenty of oil there which you may take, and get away as soon as possible.' On the following day, they took on board the *Frith* about three hundred barrels of oil from the *Richmond*. On the 6th the *Panama* and the *Junior* came near; they had not quite completed their cargoes; as there was more oil in the *Richmond* than they could all take, it was proposed that they also should complete their cargoes in the same way. Captain *Tinkham*, of the *Junior*, proposed to take part of the crew of the *Richmond*, and said he would take part of the oil, 'provided it was put up and sold at auction.' In pursuance of this suggestion, advertisements were posted on each of the three vessels, signed by or for the master of the *Richmond*. On the following day the forms of an auction sale were enacted; the master of the *Frith* bidding \$1

per barrel for as much as he needed, and the others, seventy-five cents; the ship and tackle were sold for \$5; no money was paid and no account kept or bill of sale made out. Each vessel took enough to complete her cargo of oil and bone. The transfer was effected in a couple of days, with some trouble and labor, but little or no risk or danger, and the vessels immediately proceeded on their voyage, stopping as usual at the Sandwich Islands.

"Now it is evident from this statement of the facts, that although the *Richmond* was stranded near the shore upon which the crew and even her cargo might have been saved from the dangers of the sea, they were really in no better situation as to ultimate safety than if foundered or disabled in the midst of the Pacific ocean. The crew were glad to escape with their lives. The ship and cargo, though not actually derelict, must necessarily have been abandoned. The contrivance of an auction sale under such circumstances, where the master of the *Richmond* was hopeless, helpless and passive—where there was no market, no money, no competition—where one party had absolute power and the other no choice but submission—where the vendor must take what is offered or get nothing—is a transaction which has no characteristic of a valid contract. It has

cargo to obtain the release of his vessel, he has no right to give it away. Under such circumstances the donee takes no title to the property, but is liable therefor as bailee and is bound to surrender it to the owner upon demand.¹

Sec. 795. (§ 439.) His right to know the character of the goods and the contents of packages.—It is also a general rule that the carrier has no right to demand of the shipper to be in-

been contended by the claimants that it would be a great hardship to treat this sale as a nullity, and thus compel them to assume the character of salvors, because they were not bound to save this property, especially at so great a distance from any port of safety and in a place where they could have completed their cargo in a short time from their own catchings, and where salvage would be no compensation for the loss of this opportunity. The force of these arguments is fully appreciated, but we think they are not fully sustained by the facts of the case. Whales may have been plenty around their vessels on the 6th and 7th day of August, but, judging of the future from the past, the anticipation of filling up their cargo in the few days of the season in which it would be safe to remain was very uncertain and barely probable. The whales were retreating towards the north pole, where they could not be pursued, and, though seen in numbers on one day, they would disappear on the next; and even when seen in greatest numbers, their capture was uncertain. By this transaction the vessels were enabled to proceed at once on their home voyage, and the certainty of a liberal salvage allowance for the property rescued will

be an ample compensation for the possible chance of greater profits, by refusing their assistance in saving their neighbor's property.

"It has been contended, also, that the sale was justifiable and valid because it was better for the interests of all concerned to accept what was offered than to suffer a total loss. But this argument proves too much, as it would justify every sale to a salvor. Courts of admiralty will enforce contracts made for salvage service and salvage compensation where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take advantage of his situation and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit (see 1 Sumner, 210). The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services. We are of opinion, therefore, that the claimants have not obtained a valid title to the property in dispute, but must be treated as salvors."

1. The Albany, 44 Fed. Rep. 431.

formed of the quality of the goods or the nature of the contents of packages which are offered to him for carriage, as a condition of his acceptance of them. In *Riley v. Horne*² it is said by Best, C. J., that "a carrier has a right to know the value and quality of what he is required to carry. If the owner of the goods will not tell him what his goods are and what they are worth, the carrier may refuse to take charge of them; but if he does take charge of them, he waives his right to know their contents and value." But in *Crouch v. The Railway Company*,³ it was said by Maule, J., that this was the only authority which could be found or relied upon for the contention that the carrier had the right to require the shipper to inform him of the nature of the contents of packages offered for carriage; and that the law, as thus stated, would not bear the test of reason. In this opinion the rest of the judges concurred in separate opinions, and it was held that a plea, alleging as an excuse for not accepting the goods the refusal of the owner of the package to disclose the nature of the contents of his package when a disclosure was demanded by the carrier, offered no valid defense to the action for refusal to carry, and was therefore bad upon demurrer; and this may be now stated as the universally recognized general rule upon the subject.⁴ If the goods or packages are of the character which he usually carries, or which he proposes to carry, the only inquiry which he has a right to make is in regard to their value, and this the law allows him to do for the purpose of fixing the amount of his charge for the carriage, and of ascertaining the amount of his responsibility which he is to assume, and the degree of care and attention which he will be required to exercise in respect to them.⁵

Sec. 796. (§ 440.) Same subject—Shipper must make known dangerous character of goods.—But while, as is said,

2. 5 Bing. 217.

3. 14 Com. B. 255.

4. *Crouch v. The Railway*, 7 Exch. 705; *The Nitro-Glycerine Case*, 15 Wall. 524.

5. See *Baldwin v. Steam Co.*,

74 N. Y. 125; *Gorham, etc., Co. v.*

Fargo, 35 N. Y. Super. Ct. 434;

Shelden v. Robinson, 7 N. H. 157;

Merchants' Trans. Co. v. Bolles,

80 Ill. 473; *Brown v. Railroad*

Co., 83 Pa. St. 316.

the law is not so unreasonable as to make it the duty of the carrier to make inquiries as to the nature of the contents of packages offered to him for transportation, or to make it obligatory upon the shipper to give the information when required, there is a well-established exception in regard to what are known as goods, the nature of which makes them dangerous in transportation to the persons and property of others engaged in their carriage, or to other goods. When goods of that character are offered to the carrier, it has been held to be the duty of the shipper to make known their dangerous quality, and it would be an imposition upon the carrier not to do so. Unless it be the customary or professed business of the carrier to receive and transport such goods, he may, of course, exercise his option, when he knows that they are offered, to accept them or not. To impose upon him, therefore, goods of such dangerous qualities, the true nature of which is concealed from him, would be as much a fraud upon him as to deceive him by concealing articles of the greatest value by fraudulent devices, and might be attended with even more serious consequences;⁶ and to enable the carrier, as far as public convenience will permit, to guard against imposition of this kind, it has been held that the carrier may refuse to receive packages offered to him unless the shipper will inform him of their contents whenever there is good ground for believing that they contain anything of a dangerous character. But it is only when such ground exists, arising from the appearance of the package or other circumstances tending to excite his suspicions, that the carrier is authorized, in the absence of any special legislation on the subject, to require a knowledge of the contents of the packages offered as a condition of receiving them for carriage.⁷

Sec. 797. (§ 441.) His liability for damages occasioned by dangerous goods.—It would be equally unreasonable to pre-

6. *Brass v. Maitland*, 6 Ellis & 568; *The Nitro-Glycerine Case*, 15 B. 470; *Farrant v. Barnes*, 11 Com. Wall. 524; *Williams v. East India B. (N. S.)* 553; *Alston v. Herring*, Co., 3 East, 192.
11 Exch. 822; *George v. Skivington*, 5 L. R. Exch. 1; *The Boston, etc., R. R. v. Shanly*, 107 Mass. 7. *The Nitro-Glycerine Case, supra.*

sume that the carrier had knowledge of the nature of the contents of packages carried by him when there are no attendant circumstances to awaken his suspicions as to their true character. It would be unjust to impute to him such knowledge without giving him the right, not only to inquire of the shipper, but to examine all packages delivered to him, in case he did not choose to rely upon the information thus obtained. Unless, therefore, it be shown that he knew of the dangerous qualities of the goods, such knowledge will not be imputed to him as an inference of law. But losses occasioned to the shippers of other goods by such causes do not come within the legal exceptions to the carrier's liability, and whether he was informed or knew of the danger or not, he will be liable for such losses unless protected by his contract. But he will have his remedy against the shipper of the goods by which the losses were caused.⁸

Sec. 798. (§ 442.) The liability of the shipper for injury caused by dangerous goods.—The shipper of the goods, when an injury has resulted from their explosive or other dangerous qualities, is conclusively presumed to have been aware of their dangerous character; and if he has concealed it from the carrier, he will be liable to him for all damages which he may have sustained from its effects; and whether he has given the information to the carrier or not, he will be liable to others whose goods or property have suffered injury therefrom. It will be no defense that he did not in fact know or suspect that the goods were likely to occasion the damage. In *Pierce v. Winsor*,⁹ the article shipped on the vessel with other goods was known as mastic, and was so affected by the voyage that it injured other portions of the cargo with which it came in contact, and caused increased expenditure in discharging the vessel. It was proven that the article was new in commerce, and that its dangerous character was unknown to the shipper; but he was held liable for the damage to the owner of the vessel, who had paid to other shippers the losses sustained by

8. *Brass v. Maitland*, 6 E. & B. 470. 9. 2 Sprague, 35.

them. It was said that in every shipment there is an implied contract on the part of the shipper that his goods are not of such a character as to cause injury to other goods, and that, no matter how innocent or how ignorant he may have been of their real character, the law will impute to him knowledge of the fact, inasmuch as he has had a better opportunity of acquiring it than any other person. And the knowledge of the agent of the shipper of the dangerous nature of the goods is the knowledge of the principal, even if it is admitted that such knowledge must be shown in order to fix liability for the loss upon the latter.¹⁰ Nor will the liability of the shipper cease, no matter through how many hands the goods may have passed.¹¹

II. THE CARRIER'S RIGHT TO COMPENSATION.

Sec. 799. (§ 443.) The compensation of the carrier.—The carrier has, of course, the right to make reasonable charges as compensation for the carriage of the goods, and for the responsibility and risk which he takes upon himself. This he may demand in advance, and make its payment, if he so chooses, a condition of the acceptance of the goods.¹² If, however, he

10. *Barney v. Burnstenbinder*, 64 Barb. 212, 7 Lans. 210; *Jeffrey v. Bigelow*, 13 Wend. 518.

11. *Farrant v. Barnes*, *supra*; *Thomas v. Winchester*, 6 N. Y. 397.

12. *Randall v. Railroad Co.*, 108 N. C. 612, 13 S. E. Rep. 137.

Both at common law and under the interstate commerce act a common carrier may demand payment of his freight charges in advance for goods delivered to him by a connecting carrier; nor does his act in forwarding and receiving traffic from one connecting carrier without prepayment, while refusing to do the same

thing for another connecting carrier unless prepayment is made, amount to an unjust discrimination. The right to exact payment for a service before it is rendered, or to extend credit, exists both at common law and under the interstate commerce act. *Railway Co. v. Miami Steamship Co.*, 86 Fed. 407, 30 C. C. A. 142; *Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co.*, 63 Fed. 775, 11 C. C. A. 417, 27 U. S. App. 380, 26 L. R. A. 192, *affirming* 59 Fed. 400; *Oregon Short Line, etc., Ry. Co. v. Railroad Co.*, 61 Fed. 158, 9 C. C. A. 409, 15 U. S. App. 479, *affirming* 51 Fed. 465.

chooses not to do this, he may, after he has performed the service, recover the amount agreed upon as freight upon the goods; or, if there be no agreement, he may recover from his employer, or from the consignee who has accepted them, a reasonable sum for his service. The party liable for the freight, however, when sued, may set up, in answer to the claim, any breach by the carrier of his contract, and will be allowed to set off any loss or damage to the goods for which he is liable,¹³ or sus-

But see *Express Co. v. State*, 161 Ind. 328, 67 N. E. Rep. 1033; *s. c.* 161 Ind. 705, 67 N. E. Rep. 1092 (construing Indiana statute).

"An express company, like any other common carrier, has a right to demand that its charges for transportation shall be paid in advance, and is under no obligation to receive goods for transportation unless such charges are paid, if demanded." *Express Co. v. U. S. Express Co.*, 88 Fed. 659; *affirmed*, 92 Fed. 1022, 35 C. C. A. 172.

Where a party relies upon the authority of an employe of the railroad company to waive a requirement that freight charges shall be paid in advance, it is incumbent upon him to show the authority. *McCachran v. Railway Co.*, 115 Mich. 318, 73 N. W. Rep. 231.

13. *Hill v. Leadbetter*, 42 Me. 572; *Hinsdell v. Weed*, 5 Deno, 172; *Kaskaskia Bridge Co. v. Shannon*, 1 Gilman, 15; *Gleadell v. Thomson*, 56 N. Y. 194; *Leech v. Baldwin*, 5 Watts, 446; *Humphreys v. Reed*, 6 Whart. 435; *Bartram v. McKee*, 1 Watts, 39; *Edwards v. Todd*, 1 Scammon, 462; *Ewart v. Kerr*, 1 Rice, 203; *Dyer v. Railway Co.*, 42 Vt. 441;

Snow v. Carruth, 1 Sprague, 324; *The Tangier*, 32 Fed. Rep. 230; *Aldrich v. Cargo*, 117 Fed. 757.

As a general rule, it would be wiser and safer for the freighter to pay the freight charges and then sue the carrier for any damage sustained by him for injury to his goods, since the possession of the goods by the consignee would put them earlier to their designed use and especially would afford the consignee better means of ascertaining the amount of damage already done; but this is a rule of caution and not of law, for if, through failure by the carrier to deliver the goods, or their delivery in a damaged condition, the damage resulting to the freighter is such as to render the carrier liable, he may deduct the amount of injury from the freight charges, or may set off such amount when sued by the carrier against the claim for freight. And where the damage suffered results from causes for which the carrier is responsible and is equal or in excess of the freight charges, it is not necessary in an action by the party liable for the freight to recover his damage, either to allege or prove that he has paid or tendered the amount due for freight. *Miami Powder Co. v.*

tained by him in consequence of unreasonable delay in their carriage and delivery.¹⁴ The English practice is, however, different. The carrier is entitled to his full freight if he has carried and is ready to deliver the goods, notwithstanding the damage occasioned to them by his fault or negligence, and the owner must resort to a separate action against the carrier to recover his loss.¹⁵

Sec. 800. (§ 444.) Carrier usually entitled to freight only on the goods delivered.—And in the absence of an express contract to the contrary, the carrier will only be allowed freight on the goods which he delivers. If the goods have partly wasted during the journey, from leakage or other causes, without the fault or negligence of the carrier, or if a portion of them have decayed, from their perishable nature, and have been cast away, or if a part have been necessarily jettisoned in a storm, or lost from causes against which he has protected himself by his contract, and for which he is not therefore responsible, he will still be entitled to his freight upon those which he safely delivers.¹⁶ But he will be allowed no freight for those which are lost in the course of the transportation, and could not, therefore, be delivered,¹⁷ unless there be a clear intent that he shall be paid a lump sum as freight, regardless of the loss of a part of the goods.¹⁸ So he will not be entitled

Railway Co., 47 S. C. 324, 25 S. E. Rep. 153, 58 Am. St. Rep. 880; s. c. 38 S. Car. 78, 16 S. E. Rep. 339, 21 L. R. A. 123. See also, *Moran Bros. v. Railroad Co.*, 19 Wash. 266, 53 Pac. Rep. 49, 1101, and *Missouri, etc., R'y Co. v. Implement Co.*, — Kan. —, 85 Pac. Rep. 408.

14. *Page v. Munro*, 1 Holmes, 232; *The Success*, 7 Blatch. 551.

15. *Dakin v. Oxley*, 15 Com. B. (N. S.) 646; *Dean v. Furness*, (Can.) 9 Rap. Jud. Que. B. R. 81.

16. *The Brig Bollenberg*, 1 Black, 170; *Price v. Hartshorn*, 44 Barb. 655; *Steelman v. Taylor*,

3 Ware, 52; *The Cuba*, *id.* 260; *Linklater v. Howell*, 88 Fed. 526. 17. *Gibson v. Sturge*, 10 Exch. 622; *The Tangier*, 32 Fed. Rep. 230; *London Transport Co. v. Trenchmann* (1904), 1 K. B. 635, 73 L. J. K. B. 253; *Cottrell v. Railway Co.*, — N. Car. —, 54 S. E. Rep. 288.

18. *Gibson v. Brown*, 44 Fed. Rep. 98. In this case it is said: "In all the cases where the payment of a lump sum as freight has been enforced, the intent of the parties to that effect has been clear upon the language of the bill of lading or charter-party;"

to freight if he abandons¹⁹ or converts²⁰ the goods. Nor will he be entitled to freight when the goods are not delivered through his fault and are reshipped to the consignor.²¹

Sec. 801. (§ 444a.) Carrier entitled to full freight if prevented by owner from completing journey.—But if, before the journey is completed and while the carrier is ready and willing to proceed with the journey and complete the transportation according to his undertaking, the owner, whether the consignor or consignee, intervenes and prevents the completion of the carriage, the carrier not being in fault, he will, it is held, be liable to the carrier for full freight as though the goods had been carried through to their destination.²²

citing *Shipping Co. v. Armitage*, L. R. 9 Q. B. 99; *Robinson v. Knights*, L. R. 8 C. P. 465; *The Norway*, 3 Moore, P. C. (N. S.) 245; *Querini Stamphalia*, 19 Fed. Rep. 123.

See also, *Christie v. Davis Coal & Coke Co.*, 95 Fed. 837; *affirmed*, 110 Fed. 1006, 49 C. C. A. 170; *Portland Flouring Mills Co. v. Insurance Co.*, 130 Fed. 860, 65 C. C. A. 344, *affirming* *Insurance Co. v. Portland Flouring Mills*, 124 Fed. 855; *The Queensmore*, 53 Fed. 1022, 4 C. C. A. 157, 8 U. S. App. 287.

In the latter case the shipper guaranteed the payment of the freight whether or not the cattle were "lost in any manner whatsoever." The vessel was wrecked and the cattle were lost, and the shipper was held liable for the freight.

19. *The Cito*, 7 P. Div. 5; *The James Martin*, 88 Fed. 649; *Insurance Co. v. Force*, 142 N. Y. 90, 36 N. E. Rep. 874, 40 Am. St. Rep. 576, *affirming* 20 N. Y. Supp. 796.

20. *Frazier v. Railroad Co.*, 104

Mo. App. 355, 78 S. W. Rep. 679; *Railroad Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. Rep. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579.

21. *Railroad Co. v. Neimann*, 84 Ill. App. 272.

22. *The Gazelle*, 128 U. S. 474; *Braithwaite v. Power*, 1 N. Dak. 455, 48 N. W. Rep. 354. In the latter case it appeared that the master of a vessel agreed for a stipulated price to transport goods from Bismarck, Dak., to Ft. Buford, Mont. The closing of navigation interrupted his voyage. A few days afterwards consignee forcibly took the goods from him. *Held*, that the master, being able and willing to complete the transportation to earn his freight, could recover full freight; and that, as no time for delivery was specified, the master could rightfully have held the goods until the opening of navigation that he might earn his freight by completing the transportation.

Said Corliss, C. J.:

"The master has a lien on the property to enable him to earn his freight. The moment the

The interruption or delay of the journey, while the carrier is not at fault, caused by the act of God or inclemency of the

transportation begins the lien attaches, and is not divested so long as the master is proceeding not in default. The consignor is not bound to pay until the transportation is completed in accordance with the contract, but he may not prevent the master's earning his freight. If he takes possession of the goods short of their destination, when the master, not in default, is willing and able to complete the transportation, he must pay full freight. He has prevented or waived the performance of the condition precedent. The law therefore regards it as performed. It is true that in this case the performance was prevented by the consignee, and not by the shipper; but in this respect the consignor is represented by the consignee, and the former is responsible for the acts of the latter. The consignor has done his full duty to the consignee when he has paid or agreed to pay freight to a certain point. If the consignee sees fit to take the goods at some other place when the transportation is only partially completed, and when the master is able and willing to perform his contract, he, the consignee, can make no claim against the consignor, and the latter should therefore pay the freight which the master was able, willing and had a legal right to earn. 'There can be no action unless delivery is either made or prevented from being made by the act or fault of the shipper or consignee.' 1 Pars. Shipp. & Adm. 220. The consignee, under our statute, controls the delivery of the freight, even in cases where there is a conflict between him and the consignor. Sec. 3846, Comp. Laws. He certainly has no greater right to prevent the carrier's earning freight than has the shipper. The shipper cannot, although he owns the property, stop the transportation at any point without paying full freight. 1 Pars. Shipp. & Adm. 231. The carrier, as before stated, has a lien for his freight and to earn his freight, so long as he is not in default; and neither the consignor nor the consignee can take from him the power, under such circumstances, to earn his freight, without being held to have waived the performance of the condition precedent to make delivery at the place specified. The authorities are very satisfactory on this point. Moreover, the doctrine stands on principle, and our code has embodied this rule in statutory form. Sec. 3868, Comp. Laws; Pars. Merc. Law, 349; *The Nathaniel Hooper*, 3 Sum. 542-555; *Bradstreet v. Baldwin*, 11 Mass. 229; *Luke v. Lyde*, 2 Burrow, 882-887; *Palmer v. Lorillard*, 16 Johns. 348; *Clark v. Insurance Co.*, 2 Pick. 104; *McGaw v. Insurance Co.*, 23 Pick. 405-410; *Hunter v. Prinsep*, 10 East, 394; and cases hereafter cited. We are clear that at the time the master was prevented from completing his transportation of the property he was able, willing, and had the legal right to go on with his contract, and make delivery at Ft.

Buford. The voyage was merely interrupted. The delay occasioned by this unavoidable accident had not been nor was it likely to be, so great as to justify the consignee in assuming that the delivery would not be made at Ft. Buford within a reasonable time, under all the circumstances. Even though the master had distinctly informed the consignee that he would not proceed with his contract until he could continue the transportation by river, in the spring, we believe that under the authorities the consignee could not have demanded the goods without entitling the plaintiff to full freight. In this we are sustained by eminent authority; and on principle the consignor, who had failed to provide against such a contingency in his contract of affreightment, should not be allowed to insist under such circumstances that the carrier, at perhaps an expense so great as more than to destroy the profits of the voyage, should forward the goods by another route, and by other means. A shipment by water on the verge of winter must be understood by both parties to be subject to the risks of delay from the closing of navigation, nothing to the contrary appearing in their contract. The agreement was to transport all the way by water. A reasonable time to carry by water is a reasonable time during the period that navigation is possible. In *Luke v. Lyde*, *supra*, Lord Mansfield says (p. 887): 'If a freighted ship becomes accidentally disabled on its voyage (without the fault of the master) the master has his option of two

things,—either to refit (if it can be done within convenient time), or to hire another ship to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the whole freight of the full voyage. And so it was determined in the house of lords in the case of *Lutwidge v. Grey* [H. L. 1773].'

"In *Clark v. Insurance Co.*, 2 Pick. 104, the question for decision was whether the ship-owner could recover insurance on freight, or freightage, as our statute terms it, he having delivered the cargo to the shipper, who demanded that it be immediately sent forward or delivered to him. At this time the vessel was in the port of Kennebunk, Me., into which she had put on her voyage to make repairs in consequence of damages suffered during a severe gale. It was found that it would take two months to put the vessel in proper trim to continue her voyage. The ship-owner could not recover insurance if it was still in his power to earn his freight at the time he delivered the cargo to the shipper, notwithstanding the demand; and the court ruled that the underwriters were not liable, because the ship-owner, to earn his freight, might have resumed and continued the voyage after the repairs had been made; that he was not bound to deliver at the intermediate port, in spite of the delay, except on receiving full freight. The court said: 'One test of this reasoning would be to consider whether the merchant had a right to his goods at Kennebunk, against the will of the shipper,

without paying freight. It has been already said that the contract of affreightment is not to be terminated at the will of one of the parties. The contract of affreightment is not to be terminated by the fault of the owner or master of the ship may take place, which may operate most unpropitiously upon the merchant. Such are the delays by contrary winds, as that the best planned voyages are often frustrated. Such may be the case of an embargo. Such was the case in *Palmer v. Lorillard*, 16 Johns. 348, cited by the counsel in the case at bar. *Palmer* and others had undertaken to carry some tobacco from Richmond to New York for *Lorillard*, and the ship sailed upon the voyage in February, but, finding the Chesapeake blockaded, she returned to Richmond. *Lorillard* there demanded his goods in September, but the master refused to deliver them without being paid half his freight, and in a few days the vessel and cargo were totally lost in a storm at the wharf, and the court held in that case that the contract was only suspended by the blockade, and that the owner of the ship might detain the goods until they could prosecute the voyage in safety, unless the merchant would pay full freight. There the delay was three times as great as would have been sustained by the plaintiff in the case at bar if he had repaired his ship.' And in conclusion the court said: 'But we are satisfied that the master lost the freight by his own act in giving up the voyage. He had an interest in carrying the cargo which he was not obliged to abandon on

account of the accident that happened to the ship. He might lawfully have insisted upon detaining the goods while the repairs could have been made, which it seems to us could have been made in a reasonable time.' The case of *Allen v. Insurance Co.*, 44 N. Y. 437, is peculiarly in point. The vessel in that case was stranded, and afterwards prevented from completing her trip by the ice. The case is, if anything, stronger than the one at bar, for the court said that but for the detention by stranding she would have been able to finish her voyage before cold weather could have prevented its completion. But it is by no means certain that, had the *Eclipse* not been temporarily detained while repairs made necessary by running upon a snag were being made, she would have succeeded in reaching Ft. Buford before the ice could have stopped her progress. She was detained only from 5 o'clock in the afternoon until 8 the next morning, and it was undisputed that she always lay by at night. Therefore little, if any, time was lost because of this accident. In the case cited the court held that the master had a right to complete the transportation on the opening of navigation to earn his freight, and to hold the cargo for that purpose unless paid full freight by the shipper. The court said (page 443): 'Detention by the close of navigation, which is the act of God or *vis major*, not accompanied by any accident or injury to the vessel, does not have the effect to terminate or dissolve a contract of affreightment. The owner or master of the vessel is

not absolved from his liability to the shipper, nor can the latter demand his goods free of freight on account of the detention.' To same effect, *Murray v. Insurance Co.*, 4 Biss. 417, where the court said: 'When a vessel takes a cargo, as in this case, in the fall of the year, to transport to a distant point, it is one of the incidents of the navigation that owing to variable weather or freezing up she may not be able to reach her port of destination.' Declaring the same principle are *Hadley v. Clarke*, 8 Term R. 259; *McGaw v. Insurance Co.*, 23 Pick. 405; *Allen v. Insurance Co.*, 44 N. Y. 437-443; *Hubbell v. Insurance Co.*, 74 N. Y. 246; *Hughes v. Insurance Co.*, 100 N. Y. 58; 2 N. E. Rep. 901, and 3 N. E. Rep. 71; *Griswold v. Insurance Co.*, 1 Johns. 205, 3 Johns. 321; *Pars. Shipp. & Adm.* 231-233; *Jordan v. Insurance Co.*, 1 Story, 342; *The Nathaniel Hooper*, 3 Sum. 542-559; *Bradhurst v. Insurance Co.*, 9 Johns. 17; *Insurance Co. v. Butler*, 20 Md. 41. The master is sometimes bound to forward the goods by other means in case of an interruption of the voyage, instead of delaying to repair. *Saltus v. Insurance Co.*, 12 Johns. 107; *Treadwell v. Insurance Co.*, 6 Cow. 270; *Bryant v. Insurance Co.*, 6 Pick. 131; *Adams v. Haught*, 14 Tex. 243; *Schieffelin v. Insurance Co.*, 9 Johns. 21.

"But these were all cases in which the voyage was unexpectedly delayed. In this case, both parties must have anticipated that the closing of navigation might intervene, and suspend the voyage. No time for delivery having been

specified, no provision for forwarding by other means in such a contingency having been inserted in the agreement, and the contract being to ship all the way by water, it is not a case for the application of the doctrine that delay must be prevented by forwarding the goods by other conveyance. The law, in the light of these circumstances, writes into the compact an assent to such a delay. See *Saltus v. Insurance Co.*, 12 Johns. 107; *Allen v. Insurance Co.*, 44 N. Y. 437. It cannot be said that the master, by removing the cargo from the steamer to the river's bank, had abandoned the transportation of the goods. This was done for the safety of both the vessel and the cargo, and was essential to their safety, as it is undisputed that the risk of both from the breaking up of the ice in the spring would have been greater with the steamer loaded than with the cargo on shore. It is the undoubted duty of the master to do precisely what he did do to protect the interests, not only of the cargo, but of the owner of the boat also. 'Suppose a ship meets with a calamity in the course of a voyage, and is compelled to put into a port to repair, and there the cargo is required to be unloaded in order to make the repairs, or to insure its safety, or ascertain and repair the damage done to it, would such an unloading dissolve the contract for the voyage? Certainly not.' Per Story, J., in *The Nathaniel Hooper*, 3 Sum. 542-559. See also, *Murray v. Insurance Co.*, 4 Biss. 417. We hold that full freight was earned."

weather or other like event, does not dissolve the contract of carriage or justify the owner in terminating it.²³

Sec. 802. (§ 445.) Entitled to freight, though the goods have become worthless, if they are delivered.—But if the carrier has performed his part of the contract, and the goods notwithstanding perish from internal causes of decay, or are spoiled by reason of the perils of the sea, or become damaged or worthless from accidents or causes for the consequences of which he cannot be held liable under his contract, still, if he carries them to the port of delivery and is there ready to deliver them to the consignee upon payment of his freight, or if he is able and offers to carry them, but their owner voluntarily elects to receive them at an intermediate place, the carrier will be entitled to his full freight, although the goods, in their damaged or perishing condition, are of no value to the consignee, for which he will have his remedy against the shipper personally. “The consideration for the freight is the carriage of the article shipped on board, and the state or condition of the article at the end of the voyage has nothing to do with the obligation of the contract. It requires a special agreement to limit the remedy of the carrier for his hire to the goods conveyed. It cannot be deduced from the nature of the undertaking. The ship-owner performs his engagement when he carries and delivers the goods. The condition which was to precede payment is then fulfilled. The right to payment then becomes absolute, and whether we consider the spirit of this particular contract, or compare it with the common-law doctrine of carrying for hire, we cannot discover any principle which makes the carrier an insurer of the goods as to their soundness, any more than he is of the price in the market to which they are carried. If he has conducted himself with fidelity and vigilance in the course of the voyage, he has no concern with the diminution of their value. It may impair the remedy which his lien afforded, but it cannot affect his personal demand against the shipper. This conclusion ap-

23. *Wood v. Hubbard*, 62 Fed. 753 10 C. C. A. 623.

pears to be so natural and just that I cannot perceive any plausible ground upon which it has been questioned or denied.”²⁴

Sec. 803. (§ 446.) Same subject.—A different opinion was at one time expressed by Lord Mansfield, who is reported to have said that, “if he (the merchant) abandons all, he is excused freight; and he may abandon all though they are not all lost.”²⁵ But this is said to have been a dictum for which the questions in the case did not call, and it is now conceded to have been an erroneous statement of the law, which has been settled in England in conformity with that of the American courts. “The true test,” it is there said, “of the right of freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed; and according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered to the merchant, though they be in a damaged condition.”²⁶ But when the damage to the goods

24. Per Kent, C. J., in *Griswold v. The Ins. Co.*, 3 Johns. 321; *Whitney v. Ins. Co.*, 18 *id.* 208; *McGaw v. Ocean Ins. Co.*, 23 Pick. 405; *Steelman v. Taylor*, 3 Ware, 52; *The Cuba*, *id.* 260.

25. *Luke v. Lyde*, 2 Burrow, 882.

26. *Dakin v. Oxley*, 15 Com. B. (N. S.) 646; *Duthie v. Hilton*, 4 L. R. (C. P.) 138. In *Seaman v. Adler*, 37 Fed. Rep. 268, Pardee, J., cites as authority *Maclachlan on Shipping*, 469, 470, as follows: “It may happen, however, that goods existing in specie when brought to the place of destination are so deteriorated in condition as not to be worth the freight; and then arises the question whether the merchant is bound to pay the freight, or is at liberty to abandon the goods to the ship-

owner for his claim. In considering it, the causes from which the deterioration in the merchandise may proceed must be distinguished. If it proceeds from the fault of the master or mariners, the merchant is entitled to a compensation and may recover it against the owners or master.”

“On the other hand, if the deterioration proceeds from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation or only in the confinement and closeness of the ship, the merchant must bear the loss and pay the freight. The master and owners are in no fault; nor does their contract, though taken as the contract of common carriers, contain any insurance or guaranty against such an event.”

has been occasioned by the fault of the carrier, or by accidents or causes which were not inevitable, and against the consequences of which he has not protected himself by his contract, he will, of course, be held answerable for the loss to the freighter. In such cases "the question of fortuitous damage must be settled with the underwriter, and that of culpable damage in a distinct proceeding for such damage against the ship captain or owners."²⁷ Or, in American practice, by offset or recoupment in the same action.

Sec. 804. (§ 447.) The amount of compensation for the carriage.—The amount of compensation may be fixed by statute in a proper case; it may be established by usage; it may be fixed by the agreement of the parties; and in the event that none of these methods can be resorted to, the inquiry must be, what is a reasonable rate. Where the amount of compensation for the carriage is fixed by statute, the statutory rate must, of course, prevail unless the parties have agreed upon a different rate.²⁸ Where the rate has been established by usage, the usual rate must govern in the absence of an agreement to the contrary.²⁹ Where the rate has been fixed by contract, the contract will prevail.³⁰ When, however, neither of these means

See also, *Gibson v. Brown*, 44 Fed. Rep. 98; *Shipping Co. v. Armitage*, L. R. 9 Q. B. 99.

27. *Dakin v. Oxley*, *supra*.

28. *Ante*, 574.

29. After a party has long acquiesced in the charging of a certain rate, he cannot be heard to complain that the rate so paid was unreasonable. *Killmer v. Railroad Co.*, 100 N. Y. 395. Customary and reasonable rate will prevail where no agreement. *London, etc., R'y Co. v. Evershed*, L. R. 3 App. Cas. 1029.

30. *Blackshire v. Patterson*, 72 Fed. 204, 18 C. C. A. 508, 25 U. S. App. 695.

An offer to carry freight for a

certain rate requires acceptance in order that there may be an actionable contract. If withdrawn before acceptance, and the shipper thereafter ships the goods at the usual rates, he cannot recover the excess he pays over the rates given in the offer as for a breach of contract. *Bouker v. Railroad Co.*, 35 N. Y. Supp. 30, 89 Hun, 132.

The fact that a man has on hand a large quantity of merchandise which he intends to have transported does not relieve him from any reasonable increase in the freight charge which may be made while the goods are in his custody for future transportation.

So also, the fact that a shipper

can be resorted to, the carrier will be entitled to demand and receive a reasonable compensation.³¹ Further than that his charges shall be reasonable, the common law seems to have put no restrictions upon the carrier in respect to his demand for compensation, and what is a reasonable charge can, of course, be fixed by no particular rule, but must be determined in every case as a question of fact by the same rules which would apply to other cases of service performed, except that the extraordinary responsibility of the carrier for the safety of the goods must always, in such cases, be taken into consideration as an element of the service. Compensation for the carriage is, however, generally fixed by the agreement of the parties or ascertained by the known accustomed rates of the particular business in which he is employed; and consequently but few controversies arise as to its amount between the carrier and his employer.³²

Sec. 805. (§ 447a.) Rights of shipper when excessive rates demanded.—If the owner who desires to send his goods should

endeavored to obtain the cars to ship the goods before the increased rate became operative does not change this rule, when the jury find that the carrier did not neglect improperly to perform his duty in furnishing cars. *Strough v. Railroad Co.*, 87 N. Y. Supp. 30, 92 App. Div. 584.

Where the shipper has a rate given him for goods of a certain class, but sends also goods of another class as to which a higher rate is fixed, he must pay the higher rate for the latter goods. *Smith v. Findley*, 34 Kans. 316. Compensation extorted in excess of agreed rate may be recovered. *Atchison, etc., R. Co. v. Miller*, 16 Neb. 661.

31. Where no rate is agreed upon, and none is fixed by law or usage, the carrier will be entitled

to a reasonable compensation. *London, etc., R'y Co. v. Evershed*, L. R. 3 App. Cas. 1029; *Louisville, etc., R. Co. v. Wilson*, 119 Ind. 353, 21 N. E. Rep. 341; s. c. 132 Ind. 517, 32 N. E. Rep. 311, 18 L. R. A. 105.

This rate implied by law, and by law incorporated into the contract, cannot be varied by prior parol agreement. *Louisville, etc., R. Co. v. Wilson*, *supra*.

32. There is nothing in the mere acceptance by a connecting carrier of cars from another carrier to authorize an inference that it thereby ratifies a parol contract with the prior carrier for a through rate. In such a case the law will imply an undertaking to carry at the usual and ordinary rate for which such services are performed. *Thomas*

believe his charges to be unreasonable, he should tender to the carrier, at the time he offers his goods, what he believes to be a reasonable amount for the service, and upon the carrier's refusal to accept them upon the proposed terms, the owner may bring an action against him for his refusal;³³ or if the price for the carriage is not demanded in advance, the owner may demand the goods after the carriage, tendering what he believes to be a reasonable compensation, and upon the carrier's refusal to accept the tender and deliver the goods, he may sue him for them in trover or replevin; in which, however, he would fail if the issue as to reasonable compensation should be determined in favor of the carrier. Or the consignee, or other party entitled to the goods, may pay the charges exacted as a condition of their delivery, with an accompanying denial of the right of the carrier to exact it, and may, after thus obtaining his goods, bring his action and recover so much of the payment as has been illegally demanded and paid. Money paid under such circumstances, beyond the amount to which the party demanding it is justly entitled, is paid under compulsion.³⁴ And it is not necessary, to entitle himself to

v. Railway Co., 25 Ky. L. R. 1051, 76 S. W. Rep. 1093.

33. *Carr v. Railway Co.*, 7 Exch. 707.

In North Carolina a statute compels railroads to refund overcharges within 60 days. *Cottrell v. Railway Co.*, — N. Car. —, 54 S. E. Rep. 288.

34. *Harmony v. Bingham*, 2 Kern, 99, 1 Duer, 209; *Parker v. The Railway Co.*, 6 Exch. 702, 6 El. & B. 77; *Ashmole v. Wainwright*, 2 Q. B. 837; *Snowdon v. Davis*, 1 Taunt. 359; *Peters v. Railroad Co.*, 42 Ohio St. 275; *Mobile, etc., R'y Co. v. Steiner*, 61 Ala. 559; *Lafayette, etc., R. Co. v. Pattison*, 41 Ind. 312; *McGregor v. Railway Co.*, 35 N. J. L. 89; *Baldwin v. Steamship Co.*, 74 N.

Y. 125; *Atchison, etc., R. Co. v. Miller*, 16 Neb. 661; *Lancashire Railroad Co. v. Gidlow*, L. R. 7 H. L. Cas. 517; *Great Western Railroad Co. v. Sutton*, L. R. 4 H. L. Cas. 226; *Clegg v. Railway Co.*, 135 N. C. 148, 47 S. E. Rep. 667, 65 L. R. A. 717; *Moran Bros. v. Railroad Co.*, 19 Wash. 266, 53 Pac. Rep. 49, 1101; *Louisville, etc., R. Co. v. Wilson*, 132 Ind. 517, 32 N. E. Rep. 311, 18 L. R. A. 105.

Mere intent on the part of a carrier prior to delivery to collect exorbitant charges does not constitute a conversion. Unquestionably, mere words may be sufficient to show a conversion, but it should appear that they "were uttered under such circumstances, in proximity to the property, as

this remedy, that he should have tendered to the carrier the amount which he may have thought reasonable, or that he should have stated the amount to which, in his opinion, the carrier was entitled, with an offer to pay it. It is enough that he complained of the charges as unreasonable, and paid it under protest.³⁵ The question of pleading in such cases is considered later.³⁶

Sec. 806. Rights of carrier where low rate has been secured by fraud or mistake.—If no inquiry is made concerning the value of the goods and no deceit is practiced, and the carrier agrees to carry the goods at a certain rate, he cannot thereafter, on learning that the goods were of a value which might have entitled him to demand a greater rate, recover the greater rate; and if the carrier exacts the greater rate before he will deliver the goods, the shipper may recover it back as having been paid under duress.³⁷ But “if the consignor falsely rep-

to show a defiance of the owner's right, a determination to exercise dominion and control over the property, and to exclude the owner from the exercise of his rights.” *Manda v. Wells, Fargo & Co.*, 47 N. Y. Supp. 182, 21 Misc. 308.

Freight charges are not voluntarily paid by the owner before shipment where the bill of lading contains a clause that “the owner or consignee shall pay, at the rate below stated, freight charges before delivery.” *Railroad Co. v. Wolcott*, 141 Ind. 267, 39 N. E. Rep. 451, 50 Am. St. Rep. 320.

35. *East Tennessee R. Co. v. Hunt*, 15 Lea, 261.

36. See *post*, Ch. XIV.

37. *Baldwin v. Steamship Co.*, 74 N. Y. 125.

In *Express Company v. Koerner*, 65 Minn. 540, 68 N. W. Rep. 181, 33 L. R. A. 600, the defendant as treasurer of the State of Minnesota delivered to the plain-

tiff express company in a sealed envelope, 20 United States government bonds of the total value of \$234,000.00 to be carried by it to Washington, D. C., for delivery to the U. S. Treasury department. The envelope was handed to the plaintiff's agent at St. Paul, Minn. Upon the outside of the envelope the defendant had indorsed the words, “Bonds, Value \$1,000.” On this representation, the plaintiff's agent stated that the charge would be 75 cents, whereupon the defendant paid the charge demanded. The package was safely carried to its destination and delivered to the consignee. The express company later discovered that the bonds in the package were of the face value of \$200,000.00, and brought an action to recover additional compensation, alleging that the defendant fraudulently concealed from it the true value of the package, and that the

resents to the common carrier that the goods which he desires to ship are of a certain kind, and the carrier, without notice or knowledge that they are of a different kind, accepts the goods, and fixes and accepts the freight and delivers to the consignor a bill of lading on the basis that the goods are of the character stated by the consignor, when, in fact, the goods are of an entirely different character, upon which the carrier would lawfully be entitled to charge a higher rate of freight, the carrier may, upon discovering the fact before the goods are delivered to the consignee at the place of destination, charge the excess of freight against the goods and hold the shipment until the additional charges are paid.’³⁸

Although the courts are divided upon the question of mistake, the better opinion would seem to be that where a lower rate than the regular rate is given by mistake, and is accepted by the shipper without knowledge that the rate given is erroneous, there results a binding contract and the carrier will be bound to ship the goods at the rate quoted.³⁹ But, as we have already seen, the question may be and frequently is affected by considerations of public policy under the Interstate Commerce Act or State laws for the regulation of rates.

reasonable compensation for carrying the same was the sum of \$100.00. The court held that since, in case of loss, the limit of the plaintiff's liability would have been its failure to deliver \$1,000.00 worth of such bonds, it was not entitled to extra compensation on the theory that, in case of loss, the limit of its liability would have been for its failure to deliver the whole \$234,000.00 worth of bonds; but that it was entitled to recover compensation for any increase of risk within the \$1,000 limit caused by the fact that it handled and carried so valuable a package.

38. *Railroad Co. v. Seitz*, 214 Ill. 350, 105 Am. St. Rep. 108, 73 N.

El. Rep. 585, *affirming* 105 Ill. App. 89.

39. Where the shipper merely accepts a plainly expressed proposition and does not “snap up” an offer which he knows or suspects is erroneously expressed, the carrier cannot escape liability by asserting that its agent would not have given the rate he did if he had known at the time what he was afterwards informed of. *Borden v. Railroad Co.*, 113 N. C. 570, 18 S. E. Rep. 392, 37 Am. St. Rep. 632; *Railway Co. v. Gortatowsky*, 123 Ga. 366, 51 S. E. Rep. 469.

Under this rule the converse is also true, and if the mistake is due to the shipper's fault, he cannot recover in an action for an

Sec. 807. (§ 448.) Who liable for the freight—Consignee *prima facie* liable.—The consignee is presumptively the owner of the goods,⁴⁰ and is therefore *prima facie* liable for the freight, and if he accepts them, the law implies a promise on his part to pay it; and such acceptance is evidence from which a jury must infer that he is the owner, and therefore bound by an implied contract to pay the freight upon them, unless such inference would be inconsistent with other facts of the case or with proof of ownership in another;⁴¹ and although he be not named as consignee in the bill of lading, if he be the party for whom the goods were intended, he becomes liable for the freight as soon as they are accepted by him.⁴² But if he is not the owner, he does not become liable from the mere fact of his being consignee, and no contract to pay the freight

overcharge. Where a shipper asked for a rate to Hancock and was given it, when he should have called for the rate to Fort Hancock, 283 miles farther from the point of shipment, the railroad was held not liable in an action for an overcharge. *Dillingham v. Labath* (Tex. Civ. App.), 30 S. W. Rep. 370.

Other courts, however, hold that in such cases there is no binding contract because the parties do not assent to the same thing at the same time. *Hartford, etc.; R. Co. v. Jackson*, 24 Conn. 514, 63 Am. Dec. 177; *Rowland v. Railroad Co.*, 61 Conn. 103, 23 Atl. Rep. 755, 29 Am. St. Rep. 175; *Railway Co. v. Dawson* (Tex. Civ. App.), 24 S. W. Rep. 566.

40. See *ante*, § 177.

41. *Wegener v. Smith*, 15 Com. B. 285; *Cock v. Taylor*, 13 East, 399; *Jesson v. Solly*, 4 Taunt. 52; *Sanders v. Vanzeller*, 4 Q. B. 260; *Kemp v. Clark*, 12 *id.* 647; *Zwischenbart v. Henderson*, 9 Exch. 722; *Moeller v. Young*, 5 El. & B.

755; *Philadelphia, etc., R. R. v. Barnard*, 3 Ben. 39; *Davison v. The City Bank*, 57 N. Y. 81.

In *Gates v. Ryan*, 37 Fed. Rep. 154, the court says: "The respondents were the New York agents of the shippers, and the consignees and holders of the bill of lading; and after arrival they sold the cargo and directed its delivery. They were interested in it to the extent of their commissions on the sale, and were the persons who were to pay the freight, and who in fact offered to pay it, without demurrage. Such a consignee, receiving and disposing of the cargo, is liable for both freight and demurrage. *Irzo v. Perkins*, 10 Fed. Rep. 779; *Neilson v. Jesup*, 30 Fed. Rep. 138; *Reed v. Weld*, 6 Fed. Rep. 304; *Sprague v. West, Abb. Adm.* 548."

To the same effect is *North-German Lloyd v. Heule*, 44 Fed. Rep. 100; *Taylor v. Ironworks*, 124 Fed. 826.

42. *Merian v. Funck*, 4 Denio, 110; *Abbe v. Eaton*, 51 N. Y. 410.

can be implied unless he accepts the goods;⁴³ nor even then, where the consignee is known to be merely the agent of the shipper, will the *law* imply a promise on the part of the agent to pay the freight, though from all the circumstances of the case the jury may find that there was an implied promise.⁴⁴ Such contract may also be implied from the previous course of dealing between the parties, as where the consignee had always previously paid the freight upon the goods delivered to him by the carrier under the same circumstances.⁴⁵

But the mere acceptance and removal of the goods by the consignee, with knowledge that the carrier is giving up for his benefit a lien upon the goods for a stated amount, does not create an obligation on the part of the consignee to pay charges beyond the amount stated.⁴⁶

Sec. 808. (§ 449.) Same subject—How when consignee assigns bill of lading before delivery.—But if the consignee assigns the bill of lading before the goods are delivered to him, and thus enables his indorsee to receive them, he does not become liable for the freight unless his indorsee received them as his agent.⁴⁷ The ordinary contract of the carrier is to deliver the goods to the consignee or his assigns, “he or they paying freight,” and whoever accepts them under such a contract becomes liable for the freight; and if the carrier delivers them to an assignee of the contract, without relying upon his lien to secure its payment, he must be understood as relying upon the personal liability of the assignee alone, if the assignee does not act as the agent of the assignor. A new contract arises, under such circumstances, between the assignee and the carrier.⁴⁸

43. *Coleman v. Lambert*, 5 M. & W. 502; *Scaife v. Tobin*, 3 B. & A. 523; *Davis v. Pattison*, 24 N. Y. 317; *Hinsdell v. Weed*, 5 Denio, 172; *Railroad Co. v. MacCartney*, 68 N. J. Law. 165, 52 Atl. Rep. 575.

44. *Elwell v. Skiddy*, 77 N. Y. 282.

45. *Wilson v. Kymer*, 1 M. & S. 157.

46. *Railroad Co. v. MacCartney*, 68 N. J. Law 165, 52 Atl. Rep. 165.

47. *Tobin v. Crawford*, 5 M. & W. 235, 9 *id.* 716.

48. *Cock v. Taylor*, 13 East, 399.

Sec. 809. (§ 450.) Same subject—Presumption of consignee's liability may be rebutted.—The presumption that the consignee is owner of the goods may be rebutted, and a different relation may be shown to exist; and if he be the mere agent of the shipper, or of a third person, and this fact is known to the carrier, or is shown by the bill of lading, no contract will be implied on the part of the consignee to pay the freight, although he does not inform the carrier that he receives the goods as agent. But the consignor, if owner of the goods, will remain solely liable.⁴⁹ Accordingly, if goods are consigned to the care of one person, for another for whom they are intended, the former does not become liable for the freight, although he may receive them, because he acts merely as the agent of the latter, and the only promise which can be inferred from their receipt under such direction given in the bill of lading or otherwise is *prima facie* a promise, as agent, only to pay the freight on account of the principal, and not to be personally responsible for it.⁵⁰ The effect of such special consignment is to vest the title to the goods in the person for whom they are sent, and the action for any loss or damage must be brought in his name, and the consignee for care is merely his agent.⁵¹ Nor does a mere intermediate consignee, to whose care the goods are consigned for further transportation to the ultimate consignee for whom they are intended, the facts being known to the carrier or shown by his bill of lading or receipt, become liable by receiving the goods as a mere forwarder. But in such cases the consignor, or consignee at destination, as the one or the other may be the owner, becomes liable to the carrier.⁵²

Sec. 810. (§ 451.) Same subject—Remedy against consignee not exclusive—Consignee deemed agent of shipper.—But the

49. *Amos v. Temperley*, 8 M. & Miner *v. Norwich, etc.*, R. R., 32 W. 798; *Boston, etc., R. R. v. Conn.* 91.

Whitcher, 1 Allen, 497; *Ward v.* 51. *Grove v. Brien*, 8 How. 429.

Felton, 1 East, 507; *Spencer v.* 52. *Dart v. Ensign*, 47 N. Y.

White, 1 Iredell Law, 236. '619; *Layng v. Stewart*, 1 W. & S.

50. *Amos v. Temperley, supra*; 222; *Barker v. Havens*, 17 Johns. 234; *Spencer v. White, supra*.

remedy against the consignee is not exclusive, although he may be the owner of the goods. It is held not to be obligatory upon the carrier to collect the freight of him, even when the bill of lading contains the usual clause, "he paying the freight thereon." Such provision, it has been decided, is intended for the exclusive benefit or accommodation of the freighter or shipper of the goods, and imposes no duty upon the carrier to collect the freight of the consignee; but he may even waive his lien upon the goods by delivering them to the consignee, without requiring payment of the freight, and still hold the shipper or consignor liable upon the contract of shipment. So far as the carrier is concerned, the consignee will be considered as merely the agent of the shipper to pay the freight, and if he fails to pay it the party who has reposed the confidence must take the consequences of the breach of duty. It will alter none of the rights of the carrier, to whom the shipper became bound for the freight as soon as the goods were delivered for carriage,⁵³ unless the carrier has entered into a new

53. *Railroad Co. v. MacCartney*, 68 N. J. Law 165, 52 Atl. Rep. 575; *Portland Flouring Mills Co. v. Insurance Co.*, 130 Fed. 860, 65 C. C. A. 344, *affirming* *Insurance Co. v. Portland Flouring Mills Co.*, 124 Fed. 855.

Where consignors were bound as between themselves and the consignee to pay the freight, and delivered the goods to the carrier under a "consignment note," in which, under the heading of "who pays carriage," they had inserted "consignee," it was held that the consignors were liable for the freight, the consignee having refused to pay it. *Great Western R'y Co. v. Bagge*, 15 Q. B. Div. 626, distinguishing *Dawes v. Peck*, 8 T. R. 330, and *Davis v. James*, 5 Burr. 2680. See also, *Drew v. Bird*, 1 Mood. & M. 156; *Cork Dis-*

tilleries Co. v. Railway Co., L. R. 7 H. L. Cas. 269.

But where there is no bill of lading or receipt signed by the carrier and accepted by the consignor and the way bill does not contain the consignor's name, and the freight charges are made to the consignee and the bills for freight are sent to the consignee, it cannot be held as a matter of law that the consignor contracted that he should be liable for the freight. *Union Freight Co. v. Winkley*, 159 Mass. 133, 34 N. E. Rep. 91, 38 Am. St. Rep. 398.

If a bill of lading is issued containing a provision that the consignee shall pay the freight, and the carrier thereafter relies on a special promise of the consignor to pay, the bill of lading is properly admitted in evidence as one

contract with the consignee, by which he may forfeit his right to resort to the consignor;⁵⁴ as if, without insisting upon present payment, he voluntarily, or for his own convenience, take a bill of exchange or promissory note from the consignee for the amount, payable at a future day, or in any manner extend the time for the payment, relying upon the personal responsibility of the consignee.⁵⁵ The mere taking of a check, however, for the freight from the consignee, which is dishonored, without laches on the part of the carrier by which the shipper has been damaged, will not deprive the carrier of the right to the freight from the shipper.⁵⁶

Sec. 811. (§ 452.) Same subject—Agency must be known.

—But in order that the foregoing rule that the consignee, when acting as agent for the owner, cannot be held liable for the freight, may be available to such consignee when the demand is made upon him, it must appear that the fact of such agency

step of the transaction in an action by the carrier for the freight against the consignor. And in such an action evidence is admissible that when freight was to be prepaid, it was the plaintiff's custom to indicate that fact upon the bill of lading. Nor would such testimony be inadmissible on the ground that the shipper had never shipped to a prepay station except in that one instance. The latter fact would only serve to weaken or destroy the witness' testimony. The fact that the consignor had parted with the title to the property would also properly be admitted for it might well be argued that the defendant was less likely to have specially agreed to pay the freight if he had already parted with the title. *Railroad Co. v. Macchi*, 74 Vt. 403, 52 Atl. Rep. 960.

54. *Shepard v. De Bernales*, 13

East, 565; *Tapley v. Martens*, 8 T. R. 451; *Christy v. Row*, 1 Taunt. 300; *Story on Bail*, § 589; *Holt v. Westcott*, 43 Me. 445; *Wooster v. Tarr*, 8 Allen, 270; *Blanchard v. Page*, 8 Gray, 281; *Jobbitt v. Goundry*, 29 Barb. 509; *Collins v. The Union Trans. Co.*, 10 Watts, 384; *Fox v. Nott*, 6 H. & N. 630; *Miner v. Norwich*, etc., R. R., 32 Conn. 91; *Barker v. Havens*, 17 Johns. 234; *Thomas v. Snyder*, 39 Penn. St. 317.

55. *Strong v. Hart*, 6 B. & C. 160; *Tapley v. Martens*, *supra*.

But see *Atlas S. S. Co. v. Colombian Land Co.*, 102 Fed. 358, 42 C. C. A. 398, in which it was held that the taking of a note, subsequently dishonored, will not deprive the carrier of the right to the freight from the shipper.

56. *Davison v. City Bank*, 57 N. Y. 81.

was in some manner disclosed to the carrier.⁵⁷ In *Davison v. The City Bank*,⁵⁸ drafts upon the real consignee, with the bill of lading of the cargo attached, were sent to the bank for collection. The party for whom the cargo was intended was not named as consignee in the bill of lading, but upon its margin was written, "Acct. T. L. Baker, to City Bank," Baker being the party who had advanced the money for the purchase of the cargo, and to whom the drafts belonged, and the bank being a mere agent to collect them. But it was held that the words upon the margin of the bill made the bank ostensibly the real consignee, and that, as the facts were unknown to the carrier, the bank, which had received the cargo by directing it to be deposited subject to its order, was liable for the freight upon the subsequent failure of the intended consignee, who had assumed to pay it by giving his check to the carrier for the amount, which was, however, dishonored.

Sec. 812. (§ 453.) The rule when the freight is to be paid by measurement.—Where freight is to be charged by measurement of bulk, and there are no special stipulations upon the subject in the bill of lading, it has been held in several cases that the measurement at the time of shipment, and not at the time and place of delivery, is to be adopted for the purpose of estimating its amount. In *Gibson v. Sturge*,⁵⁹ the cargo consisted of wheat, a portion of which, on the voyage, became heated, in consequence of which its bulk became increased before its delivery, and it was claimed that the freight was payable on the quantity delivered. "The first question is," said Pollock, C. B., "Is this claim supported by the terms of the bill of lading? And it appears to me that it is not. From the terms of the bill of lading, I infer that the freight was to be paid for the commodity shipped, carried and delivered; and that all these must concur to create a title to freight. If shipped and carried, but not delivered, freight would not be payable; so, I think, if delivered but not shipped; and this agrees with the decisions (very few in number, and none of

57. *Sheets v. Wilgus*, 56 Barb. 662.

58. *Supra*.

59. 10 Exch. 622.

them precisely in point) which are to be found in the books on the subject of the increase or decrease (during the voyage) of the article to be carried. I agree that the bulk or weight, as appearing at the port of destination, may be *prima facie* the criterion of the freight to be paid; but when it is proved that that test is fallacious and untrue, and that the real quantity shipped was a different and smaller quantity (as the jury in this case have actually found), then I think that the freight ought to be calculated upon the true quantity shipped; and, in my judgment, the captain's ignorance of the true quantity (as expressed in the bill of lading) cannot entitle him to charge freight according to a false estimate; whether the actual quantity be stated and admitted in the bill of lading, or the contents are stated to be unknown, appears to me to make no difference as to the principle which ought to govern our decision. But it does appear to me to be contrary to the principles of natural justice that the ship-owner should acquire a right to demand more freight, and the owner of the goods become liable to pay more freight, in consequence of a circumstance which is an injury to the goods, and which has occurred to them while they were in the care, custody and keeping of the ship-owner or those who represent him, over the causes of which the owner of the goods has no control, but some of the possible causes of which are considerably or entirely under the control of the captain and the crew." And the rule thus established has since been applied to cases in which cargoes of cotton in tightly compressed bales have expanded upon the voyage or upon being taken from the ship's hold.⁶⁰ And the same rule has been applied when the freight was to be computed according to the weight of the goods.⁶¹

Sec. 813. (§ 454.) Must be calculated on amount carried and delivered.—The rule, therefore, that freight must be cal-

60. *Shand v. Grant*, 15 Com. B. (N. S.) 324; *Buckle v. Knoop*, 2 L. R. Exch. 125, 333; *Coulthurst v. Sweet*, L. R. 1 C. P. 649. Hides, 6 Ben. 199; *Abbott on Ship*, 430. Or, according to the number of bushels. *Allen v. Bates*, 1 Hilt. 221.

61. Nine Thousand, etc., Dry

culated upon the quantity of goods shipped, carried and delivered, or, as expressed by Alderson, B., in the same case, "on that amount only which is put on board, carried throughout the whole voyage, and delivered at the end to the merchant," and that all these conditions must concur in order to entitle him to his freight, is one of importance to the carrier. One consequence of it is that he can never be the gainer by an increase of bulk or weight during the voyage, but may be the loser by its decrease; and in the carriage of those classes of goods which are liable to waste from leakage, shrinkage, evaporation and the like, and of live animals, which may die upon the journey or voyage, he should provide against loss of freight from such decrease by his contract; otherwise he will be entitled to claim only for what is delivered, no matter how much less in weight, quantity or number than when shipped.

Sec. 814. (§ 455.) Freight pro rata itineris.—The condition that the carrier, in order to entitle himself to compensation for the carriage of the goods, must deliver them to the consignee at the place of original destination, is not, however, absolute under all circumstances. It has already been stated¹ that the consignee or owner may stop and reclaim them at any point upon their journey, but that if he do so before they reach their destination, when the carrier is able and willing to go forward with them and is actually engaged in their transportation, he must pay to the carrier full freight, as though he had completed their carriage as at first directed. It has also been shown that if the carrier, in the course of the transportation, meet with disaster which disables him from the further prosecution of his journey, or if from any cause it becomes impossible for him to proceed, or if he is obliged to submit to a long delay, it becomes his duty to forward the goods by another carrier if it can be done, and that if by such transshipment they reach their destination in a reasonable time he will be entitled to claim his freight for the whole distance. Under such circumstances, however, it is of course competent

1. *Ante*, §§ 660, 801.

for the parties to enter into a new agreement, if the owner is willing to accept a redelivery to himself of the goods and to release the carrier from further responsibility, and the carrier agrees to surrender them. Such a course may, under the existing difficulties, frequently be to the interest of both parties, and is often adopted. The owner may find a market for his goods at the place of disaster or necessity, and he may find it more advantageous to dispose of them there than to incur the expense and risk of their further transportation, or he may wish to change their destination, or may prefer, in order to save expense or to hasten the carriage, to take upon himself the responsibility of their reshipment. If the owner thus voluntarily takes back the goods after a part of the service which the carrier undertook has been performed, the original contract of shipment is considered as abandoned by the agreement of the parties, and a new one is implied on the part of the shipper, that he will pay the carrier a proportionate part of the freight, or, as it is usually termed, *pro rata itineris*.²

Sec. 815. (§ 456.) Same subject—Acceptance must have been voluntary.—In such cases the first question to be determined is whether the circumstances of the acceptance by the owner of the goods have amounted to a waiver of their further carriage, and a voluntary consent to receive them at the place to which they have been carried. It was formerly held that, even when the carrier refused or was unable to proceed with the transportation, after having been overtaken by disaster, or failed to tranship the goods when he had it in his power to do so, if the owner, from the necessity of the case and to prevent their sacrifice, took them in charge and had them forwarded by means provided by himself, or if the carrier sold the goods at the place of necessity even when he had no authority to do so, and paid the proceeds over to the shipper,

2. *Pro rata* freight is never payable, however, on property destroyed during the voyage, since the contract to deliver at destination in such case is neither performed nor its performance waived. *Insurance Co. v. Southern Pac. Co.*, 72 Fed. 285, 18 C. A. 561, 38 U. S. App. 243, affirming 55 Fed. 82.

who voluntarily received them, he was still entitled to *pro rata* freight,³ and the acceptance was regarded as voluntary where it was not enforced by threats or physical compulsion. But the now well-settled rule is,⁴ that the mere acceptance, either of the goods or of their proceeds, can give no claim to *pro rata* freight if introduced, not by a desire to obtain possession of them at the place to which they have been carried in preference to the original place of destination, but by the circumstances of the case, and the necessity for receiving them there or abandoning them altogether; and that, in order to render the act of the owner in receiving the goods at the point where the voyage is broken up really voluntary, there must be some choice offered him as to whether he will receive them there or at the original point of destination, and that the question of volition cannot be confined to the mere fact of acceptance, but must be considered in reference to all the circumstances under which it takes place.⁵

Sec. 816. (§ 457.) Same subject—How question determined.—Whether the acceptance of the goods was voluntary, in the absence of an express agreement, must be determined by the existing facts and the conduct of the parties. Where the carrier refuses to repair his ship after the disaster, and to send on the goods or to procure another vessel for the pur-

3. *Luke v. Lyde*, 2 Burr. 882; *The Ins. Co. v. Lenox*, 1 Johns. Cas. 377; *Williams v. Smith*, 2 Caines, 13; *Robinson v. The Marine Ins. Co.*, 2 Johns. 323; *Teasdale v. The Ins. Co.*, 2 Brev. 190; *Escopiniche v. Stewart*, 2 Conn. 391.

4. *Braithwaite v. Power*, 1 N. D. 455, 48 N. W. Rep. 354; *Transportation Co. v. Hoyt*, 69 N. Y. 230; *McGaw v. Insurance Co.*, 23 Pick. 405.

5. *Welch v. Hicks*, 6 Cow. 504; *Hurtin v. The Union Ins. Co.*, 1 Wash. C. C. R. 530; *Armroyd v. The Ins. Co.*, 3 Bin. 437; *Callender v. The Ins. Co.*, 5 *id.* 525; *Caze v. The Baltimore Ins. Co.*, 7 Cranch, 358; *The Columbian Ins. Co. v. Catlett*, 12 Wheat. 383; *Richardson v. Young*, 38 Penn. St. 169; *Hunter v. Prinsep*, 10 East, 378; *Liddard v. Lopes*, *id.* 526; *Cook v. Jennings*, 7 T. R. 381; *The Teutonia*, L. R. 3 Adm. 394; *The Propeller Mohawk*, 8 Wall. 153; *Merchants', etc., Ins. Co. v. Butler*, 20 Md. 41; *Bork v. Norton*, 2 McL. 422; *Crawford v. Williams*, 1 Sneed, 205; *Rossiter v. Chester*, 1 Doug. (Mich.) 154.

pose, no choice is given to the owner, and an acceptance by him will not be treated as voluntary in the absence of an express agreement. But if it be shown that the carrier was able and willing to send forward the goods, or that he proposed to prosecute his voyage to destination, after the necessary delay for repairs, the acceptance may be presumed to have been the voluntary act of the owner; and if it be further shown that it was in any way to his advantage to accept them at the intermediate port or place of disaster, the presumption would be still stronger that his acceptance was from choice; and in every case it must be a question of fact, to be determined under all the circumstances, where there is no stipulation upon the subject. As said by Tilghman, C. J., in *Gray v. Waln*,⁶ freight *pro rata* is due "when the consent of the merchant, either by words or by actions, has been expressly given, or may be fairly inferred, to accept his goods at an intermediate port." If the owner sell the goods at the place of detention, when the means to forward them to destination could have been procured, it will be an almost conclusive proof of an election to accept them there; and if it be further shown that the market for the goods was higher there than at the place of destination, the presumption would be still more conclusive. The goods may also be accepted by an agent or supercargo on behalf of the owner, or by the underwriters of a policy of insurance, and their acts in dealing with the goods under such circumstances will have the same effect and be liable to the same construction as if done by the owner in person.⁷ But before such an inference of the voluntary acceptance of the goods by the owner will be made, in order to charge him with an apportionment of the freight, it must be shown that the carrier was willing and able, and that he proposed to send them forward, or to complete the carriage himself at the expiration of the necessary delay. For if he decline or refuse to do one or the other, nothing short of an express agreement will entitle him to any part of the freight.

6. 2 S. & R. 229.

51; *The Prop. Mohawk*, 8 Wall.

7. *Smyth v. Wright*, 15 Barb. 153.

Sec. 817. (§ 458.) Same subject—Acceptance of proceeds of sale made without consultation with owner not an acceptance of the goods.—When in the absence of the owner, and without consultation with him, the goods have been sold by the carrier at the place of detention, and the proceeds have been accepted by the owner, the receipt of such proceeds is not equivalent to an acceptance of the goods at the intermediate place of disaster, and does not estop him from disputing the claim of the carrier to freight. And if it should appear that the sale was made without authority, the carrier will be allowed no compensation whatever for the service actually performed; as, for instance, if the goods have been sold on account of the unfitness of the vessel, which had been disabled by a storm, to carry them further;⁸ or under the decree of a court, which was subsequently reversed as erroneous;⁹ or by a person who assumed to act for the owner, but really had no authority.¹⁰

Sec. 818. (§ 459.) Same subject—How when transportation to destination impossible.—These cases, however, as was said in *Vlierboom v. Chapman*,¹¹ furnish no authority in cases in which the sales of the property were rightfully made; but the law was ruled the same way in that case, notwithstanding the validity of the sale was admitted. After stating the general rule, that in order to justify a claim to *pro rata* freight there must be a voluntary acceptance of the goods at the intermediate port in such a mode as to raise a fair inference that the further carriage of them was intentionally dispensed with, and the inapplicability of the cases where the sales had been made tortiously, Parke, B., proceeded to answer the argument based upon the validity of the sales, as follows: “But it was said that where the goods were *lawfully* sold from necessity, the case was different; for that, in such a case, neces-

8. *Hunter v. Princep*, *supra*; 10. *Penoyer v. Hallett*, 15 *Armroyd v. The Ins. Co.*, *supra*; Johns. 332; *Escopiniche v. Stew-Callender v. The Ins. Co.*, *supra*. art. 2 Conn. 391.

9. *Caze v. The Ins. Co.*, *supra*; 11. 13 M. & W. 230.
Columbian Ins. Co. v. Catlett,
supra.

sity imposed upon the master the character of agent for the shipper, in addition to his ordinary one of agent for the ship-owner, and that, having that double agency, he might be presumed to have intended to make a reasonable contract between his two principals; that is, on behalf of the ship-owner, to give up the goods at the intermediate port, instead of carrying them on; and on behalf of the shipper to receive them there, and pay reasonable freight for the part of the voyage already performed. It is difficult to conceive any conjuncture in which such a presumption could be made; for the agency of the master from necessity arises from his total inability to carry the goods to the place of destination, which dispensed with the performance of that primary duty altogether; and the right to freight *pro rata*, from the presumed waiver on the part of the shipper of the performance of a duty which the master was ready to execute. At all events, we think that no such presumption can be made in this case. According to the statement in the special case, an emergency had arisen, in which, as the law is laid down by Lord Stowell, in the case of *The Gratitude*, the authority of agent for the shipper necessarily devolved upon the master to do the best for his interest, and that was to sell, because the cargo was perishable, and would have perished if it had been left at the Mauritius, or been attempted to be carried to its place of destination. This sale, therefore, transferred the property and bound the shipper; but in no other respect did the necessity, under the circumstances of this case, confer upon him any agency. But if we suppose that he had a further authority, and that instead of being master he had been supercargo, and that his sale of the goods had been equivalent to a sale by the defendants themselves, present at the Mauritius, there would have been no reasonable ground to infer a new contract to pay freight *pro rata*; for the ship-owner was not ready to carry forward to the port of destination, in his own or another ship, and, consequently, no inference could arise that the shippers were willing to dispense with the further carriage, and accept the delivery at the intermediate instead of the destined port.

The truth is, that the goods were in the same situation, as to the claim for freight, as if they had been abandoned by the ship-owner and left behind at the Mauritius, and there sold by the owner. This view of the case accords with the decisions in the American courts to which we were referred,¹² in both of which it was held that, if the cargo is sold at an intermediate port for the benefit of all concerned, no freight is due." It may, therefore, be stated that no freight can become due where the transportation of the goods to the place of destination has become impossible, and the voyage is abandoned, even where the impossibility arises from their perishable nature, and they have been consequently sold under the authority conferred upon the carrier by the necessity of the case, and the proceeds of the sale have been accepted by their owner.¹³

But it has been held in admiralty with respect to the carriage of goods for long distances under bills of lading which recognize several distinct carriers and stages of transportation that, when the further transportation of the goods is prevented by some incapacity in the goods themselves and a condition of things arises which makes a sale, or a delivery to some one representing the owner at one of the recognized points of trans-shipment where there is a market, the only really practicable course, a reasonable rule of partial compensation for the service performed may be applied.¹⁴

Sec. 819. (§ 460.) Same subject—How when carriage interrupted by war.—If, subsequently to the contract of carriage, the nation to which the carrier belongs engages in a war with the nation to which the destined port belongs, and the carrier

12. *Armroyd v. The Insurance Co., supra*; *Hurtin v. Union Insurance Co., supra* (cited in the note to Mr. Justice Story's edition of *Abbott on Shipping*). *McGaw v. The Ocean Ins. Co.*, 23 Pick. 405; *Hugg v. The Augusta Ins. Co.*, 7 How. 595.

13. *Richardson v. Young*, 38 Penn. St. 169; *The Ship Nathaniel Hooper*, 3 Sum. 542; *Jordan v. The Warren Ins. Co.*, 1 Story, 342; 14. *Insurance Co. v. Southern Pacific Co.*, 72 Fed. 285, 18 C. C. A. 561, 38 U. S. App. 243, *affirming* 55 Fed. 82; *Scow No. 190 and 450 Bales of Cotton*, 88 Fed. 320.

finds upon arrival in its neighborhood that he cannot enter without imminent risk of capture, he may decline to attempt to do so, and may retire to a port of safety, there to await further orders from the shipper, without forfeiting his claim to *pro rata* freight, if he has, notwithstanding, performed a valuable service to the shipper. This was decided in the case of *The Teutonia*,¹⁵ a Prussian vessel which contracted to carry a cargo from South America to the port of Falmouth, and thence to such destination as the shipper might direct. On arrival at Falmouth, orders were given to proceed with the cargo to Dunkirk. Upon arrival in the neighborhood of the latter place, the master was informed of the commencement of hostilities between the French and Prussians. He therefore returned to Dover to await the orders of the shipper, who demanded his goods, and denied the right of the carrier to any compensation. But his claim to the goods without the allowance of freight was not allowed, and the learned judge, Sir R. Phillimore, in his judgment in the case, uses language worthy of attention. After stating the facts, he proceeded to say that, "in this state of facts, I am of opinion that the *Teutonia* would have incurred a double risk in proceeding to Dunkirk. She would have been exposed to the peril of being seized by a French cruiser on the ground of her Prussian nationality, and of being seized by a Prussian cruiser on the ground of her trading with and carrying contraband of war to the enemy. The information which the pilot gave her off Dunkirk was substantially correct. War had in fact broken out, or was so imminent as to render Dunkirk an *unsafe port* for a Prussian vessel. . . . But I do not find any case which goes the length of saying that where a supervening moral impossibility, arising out of the prohibition imposed by a law not applicable, or not existing, at the time of the making of the contract, has prevented its fulfillment, the merchant is entitled to have his goods carried by the ship almost, as in this case, the whole length of the voyage, without any compensation to the shipowner. . . . I find no authority for the position that the

contract is dissolved in the sense of rendering null all that has been previously done under it, though it is dissolved as to all future consequences. . . . This may be the doctrine of the common law, where a physical unexpected obstacle which might have been guarded against in the contract prevents the completion of it; but in this instance, the completion is prevented by the act of the law itself. . . . The old case of *Paradine v. Jane*,¹⁶ and others founded upon the principles therein contained, have been cited to me as authorities for the contention that the *Teutonia* was guilty of a breach of contract in not proceeding to Dunkirk, even in the circumstances which I have stated. The propositions of law in *Paradine v. Jane* are 'where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.' But assuming that this is at present a correct exposition of the law of England (though the last proposition is, I think, not in harmony with the jurisprudence of any other European state), it does not seem to me to affect this case. Indeed, it has not been denied that if the contract has become illegal in virtue of a law subsequent to it, the non-execution of the contract is no breach."

Sec. 820. (§ 461.) Same subject—Rule for adjusting freight pro rata.—The rule for adjusting *pro rata* freight where it is allowed, adopted by Lord Mansfield in *Luke v. Lyde*,¹⁷ is to ascertain how much of the voyage has been performed when the disaster happened which compelled the vessel to seek a port. In *The United Insurance Co. v. Lenox*,¹⁸ it was decided that the true measure of the amount was to be found in the proportion of the voyage performed, not at the place where the accident happened, but at that where the

16. *Aleyn*, 26.

18. 1 *Johns. Cas.* 377, 2 *id.* 443.

17. 2 *Burr.* 882.

cargo was accepted by the owners; and this has been generally approved by the courts of this country as the more correct and equitable rule.¹⁹

Sec. 821. (§ 462.) Same subject—The application of the rule.—The rule thus adopted forbids all investigation into the questions of benefit received by the shipper from the partial transportation, and of the expense of reshipment from the port of acceptance to destination, and divides the amount due by the terms of the original contract of shipment, in the proportion of the distance performed to the whole distance of the voyage as originally contemplated. It is admitted that its strict application to many cases would occasion injustice to the shipper, as where the ship has been obliged by stress of weather to depart from the direct course of the voyage, and being wrecked, the expense of sending the goods to their destination from the place of acceptance is much greater in proportion to the distance than that agreed upon for the entire voyage. This was the case of *Coffin v. Storer*,²⁰ in which it was said by Parsons, C. J., that “the rule adopted in *Luke v. Lyde* is manifestly unjust, for it is in that case admitted that the expense of freight to the destined port from the port where the freighter received the goods was as great as from the shipping port, so that he received no benefit from the proportion of the transportation for which payment was demanded of him.” But while these objections to the general rule are admitted to be sometimes well taken, it is said to commend itself on account of its certainty and simplicity of application, and will be followed, except perhaps in cases in which it would cause palpable and serious injustice.

Sec. 822. (§ 463.) Transshipment of goods when vessel delayed.—As has been seen, when the prosecution of the voyage has become impossible in the vessel with which it was begun, or the delay occasioned by the disaster or obstruction is

19. 3 Kent's Com. 230; *The Robinson v. Ins. Co.*, 2 Johns. 323.
Propeller Mohawk, 8 Wall. 153; 20. 5 Mass. 252.
Smyth v. Wright, 15 Barb. 51;

likely to prove disastrous to the goods, it is the duty of the carrier to forward them by some other means of conveyance, when it can be procured. In such a case of necessity, it is evident that the authority of the carrier is not limited to that which appertains to his rights strictly as carrier, but grows out of the agency which the law, from the necessity of the case, imposes upon him; and, having invested him with such authority, the law allows the employment of any reasonable means which may be necessary to save the goods and, at the same time, forward them to their destination. He may, therefore, in such an emergency, hire another carrier to convey them to their destination, at any price which it may be necessary to pay, and which, considering the nature of the goods and other circumstances, he may consider proper, whether such price exceed or fall short of the amount of freight due under the original contract between the parties, and the freight for the carriage of the goods upon such renewed voyage becomes a charge upon them. The law is thus stated by Chancellor Kent in *Searle v. Scovell*,²¹ upon the authority of both text-writers and cases which are there cited by him.

Sec. 823. (§ 464.) Same subject—Payment of freight in such cases.—The shipper, in the event the freight from the port of necessity shall exceed that which would have been due under the original contract, will be bound for such excess to the carrier who completes the transportation, upon the ground that the contract to pay it was made on his behalf; and such carrier will have a lien upon the goods to secure its payment. But neither the shipper nor the goods will be bound both for the freight agreed to be paid to the original carrier, and for that to which the substituted carrier has become entitled.²²

21. 4 Johns. Ch. R. 218.

Without deciding that there is an obligation to transship, the Supreme Court of Canada in *Owen v. Outerbridge*, 26 S. C. R. 272, decided that the option to transship is to be exercised, if exercised at all, within a reasonable time.

22. In *Matthews v. Gibbs*, 3 El. & El. 282, it is held that the master can only transfer the lien which his own vessel has upon the goods; and that if the shipper has already paid to the first carrier any part of the freight, the lien of the substituted carrier is

The freight due to the substituted vessel, if less than that which the shipper has agreed to pay for the entire transportation, must be deducted from it, and the balance is what he will owe the carrier who undertook but only partially performed it. If it be more, the latter will have no claim to freight, and the shipper must bear the loss of the excess.²³

Sec. 824. (§ 465.) Same subject—Difference in rates, how adjusted.—The leading English case upon this case is that of *Shipton v. Thornton*,²⁴ in which the facts were that a transshipment from necessity had been made of the goods, for an amount of freight less than that stipulated for by the terms of the original contract. The shippers contended that they were liable to the carrier who had first undertaken the carriage, and had been compelled to complete it with a substituted vessel, only for the freight to the port of transshipment, they having already paid to the substituted carrier his own freight. But it was held to have been the right of the master to transship the goods, and that, as he had fulfilled his undertaking to carry the goods to destination, he had earned his full freight according to the contract of shipment, it being a matter of indifference to the owner of the goods whether they had arrived by one vessel or another. “One question, however, has been asked,” continued Lord Denman, who delivered the judgment of the court, “which it will not be right to pass over. What, it has been said, if the transshipment can only be effected at a higher than the original rate of freight? . . . No case of the sort, that we are aware of, has occurred in this country; nor is it necessary for us to express any opinion further than as it bears on the present question. It may well be that the master’s right to transship may be limited to those cases in which the voyage may be completed on its original terms as to

only co-extensive with what remains unpaid. *v. The Ins. Co.*, 3 Johns. 321; *Clark v. The Ins. Co.*, 2 Pick. 104; *Crawford v. Williams*, 1 Sneed, 205.

23. *Hugg v. The Mining, etc. Co.*, 35 Md. 441; *Hugg v. The Augusta Ins. Co.*, 7 How. 595; *Searle v. Scovell*, *supra*; *Griswold* 24. 9 A. & E. 314.

freight, so as to occasion no further charge to the freighter; and that where the freight cannot be procured at that rate, another but familiar principle will be introduced, that of agency for the merchant. For it must never be forgotten that the master acts in a double capacity; as agent of the owner as to the ship and freight, and agent of the merchant as to the goods. These interests may sometimes conflict with each other; and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances, in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and, therefore, the owner's *right* to transship will be at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; and if so, it will be the duty of the master as his agent to do so. *In such a case*, the freighter will be bound by the act of his agent, and, of course, be liable for the increased freight. The rule will be the same whether the transshipment be made by the ship-owner or the master; and in applying it circumstances make it necessary, on the one hand, to repose a large discretion in the master or owner, while the same circumstances require that the exercise of that large discretion should be very narrowly watched."²⁵

Sec. 825. (§ 466.) Same subject—Power of master as agent.—The master may, however, act as the agent of the owners of his own ship in making the transshipment; and when he

25. The law upon this subject is thus summed up by Dr. Lushington, in his judgment in the case of *The Soblomsten* (L. R. 1 Adm. 293):

"First, that upon the vessel becoming disabled at an intermediate port, the master is allowed a reasonable time within which to reship or transship so as to earn his freight.

is payable if, by the default of the owner of the cargo, the master is prevented from forwarding the cargo from the intermediate port to its destination.

"Third, that no freight is payable, if the owner of the cargo, against his will, is compelled to take the cargo at an intermediate port.

"Fourth, that to justify a claim for *pro rata* freight, there must be

has employed another vessel at a less rate than that which the shipper has agreed to pay, so that a profit will be made by the transshipment, it will be presumed that he has made the contract in the interest and as the agent of the owners of his ship, and not as the agent of the owners of the cargo, and any saving which may be thus made will inure to the benefit of the former.²⁶ But the master cannot, as the agent of the owners of his vessel, bind them by his contract with the substituted carrier to pay more freight than was agreed upon in the original contract of shipment.²⁷ Thus the carrier may make a profit by a transshipment, while the shipper, being bound to pay at least the amount fixed by the original contract upon the arrival of his goods, and more in case the transshipment is made at a higher rate, can never be the gainer and may be a loser. This power of the master is therefore liable to great abuse; but, as said in *Searle v. Scovell*,²⁸ "the opportunity of abuse exists equally in cases of acknowledged power, and cannot impeach the soundness or utility of the general principle." The power to bind the owner of the goods to an increased freight should, therefore, be admitted only in a case of clear necessity; and if it appear that the master of the vessel could by the expenditure of a small sum for repairs have brought the goods safely to their destination, he and the owners of his ship will be held liable to the shipper for not having done so, when the latter has been compelled to pay for the renewed voyage in excess of his contract.²⁹

Sec. 826. (§ 467.) No freight recoverable when ship captured by the public enemy.—If the vessel be captured by the public enemy no freight will be recoverable by the carrier; the rule being in such cases that the carrier loses his ship and freight, and the shipper his goods.³⁰ But if the ship be re-

a voluntary acceptance of the goods by their owner at an intermediate port in such a mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with."

26. *Hugg v. The Mining, etc.*

Co., 35 Md. 414; *Matthews v. Gibbs*, 3 El. & El. 282.

27. *Lemont v. Lord*, 52 Me. 365.

28. 4 John. Ch. 218.

29. *Wilson v. The Bank of Victoria*, L. R. 2 Q. B. 203.

30. *Tirrell v. Gage*, 4 Allen, 245;

captured and the goods be afterwards carried to their destination the same rule will, of course, apply as in cases of the completion of the carriage after detention by an embargo or a physical obstruction to its prosecution; and upon the delivery of the goods the carrier will be entitled to his full freight, as though there had been no interruption of the voyage.³¹

Sec. 827. (§ 468.) Right to freight where the goods are carried contrary to the wishes or directions of the owner.—

When it is said that the owner of the property becomes liable for the price of the carriage, it is to be understood that he was either the bailor or that the property was intrusted to the carrier for transportation by his direction or authority. If, however, it be in the possession of another, whether rightfully or wrongfully, who sends it contrary to the wishes and without the authority of the true owner, who afterwards reclaims it from the carrier, the question may arise whether such owner can be held liable personally for the carrier's charges. As the owner, under these circumstances, would be no party to the contract, there could be no recovery against him upon that ground; nor could it be urged by the carrier that the compulsion under which the law puts him to receive and carry the goods of all who applied, without the right to require evidence of ownership, created any obligation to pay for a service which the owner was in no wise instrumental in imposing upon him; nor could any liability on the part of the owner, or responsibility to him on the part of the carrier, grow out of the wrongful and unauthorized bailment, without a subsequent adoption or ratification of the act of the wrongdoer. The carrier would therefore stand upon the same footing as any other person who might be found in the wrongful possession of the property, and could recover no compensation from the owner for any service he might have performed in respect to the property, no matter in how good faith he might have accepted it, and even though he may have added to its value or car-

Beale v. Thompson, 3 Bos. & P. 31. Mumford v. The Insurance Co., 5 Johns. 262.

ried it to the destination at which the owner really preferred to have it. And upon demand of the true owner, and a refusal to surrender it to him, the carrier would be liable to an action for a conversion, and to damages for the enhanced value,³² unless he could claim the right to deduct his charges upon the ground of a lien upon the property for his compensation.³³

So if he carry the goods against the express orders of the owner, it is a gratuitous act on his part, for which he will be entitled to recover no compensation.³⁴ Thus, where goods marked for transportation over a particular line are sent forward by a preceding carrier over a different line, the latter cannot recover for freight or maintain a lien therefor, the marks being evidence of the shipper's intention.³⁵

Sec. 828. (§ 469.) Carrier cannot sue for freight until the goods are delivered.—The carrier may, as has been stated, demand payment of his freight before the carriage of the goods is undertaken; but if he fail to do so, and accept them without requiring prepayment, he cannot commence an action to recover it until he has delivered the goods, or has offered to do so. Delivery is an essential part of his contract, and it would be unjust to compel payment of the price of the carriage until it has been fully performed. Otherwise, the carrier might recover for an uncompleted service while still continuing to hold possession of the goods.³⁶ But he will be entitled to his freight as soon as he has delivered the goods in the manner permissible for carriers engaged in his mode of carriage; and neither a delivery, nor a tender to the consignee in person, will be required, where the law treats the carriage as com-

32. *Brown v. Sax*, 7 Cow. 95; *Silisbury v. McCoon*, 3 Comstock, 379; *Benjamin v. Benjamin*, 15 Conn. 347. (But see *Silisbury v. McCoon*, 6 Hill, 425, 4 Denio, 332.)

33. *Martin v. Porter*, 5 M. & W. 351.

34. *Schureman v. Withers*, Anthon's N. P. 166.

35. *Bird v. Railroad Co.*, 72 Ga. 655.

36. *Mashiter v. Buller*, 1 Camp. 84; *Andrew v. Moorehouse*, 5 Taunt. 435; *Lane v. Penniman*, 4 Mass. 91; *Certain Logs of Mahogany*, 2 Sumn. 589; *Brittan v. Barnaby*, 21 How. 527; *Gibson v. Sturge*, 10 Exch. 622; *Clark v. Masters*, 1 Bosw. 177; *Railroad Co. v. Diether*, 10 Ind. App. 206, 37 N. E. Rep. 39, 1069, 53 Am. St. Rep. 385, citing *Hutch. on Carr.*

plete without an actual delivery into the possession of such consignee. It has accordingly been held that a carrier by water becomes entitled to his freight when the delivery of the goods is made upon the wharf, and notice is given to the consignee, whether he accepts them or not. If he refuses them, it will be the duty of the carrier to store them for the owner; but having done all that he was required to do by his contract, by landing the goods and giving the notice, his right to the freight becomes complete.³⁷

Where the initial carrier has received the amount of his charges from the connecting and final carrier, the right to recover freight is assigned to the latter by operation of law, and an action therefor will not lie in the name of the initial carrier.³⁸

Sec. 829. (§ 470.) When delivery deemed complete.—And so if the whole duty of the carrier is only to carry safely to destination, and there deposit the goods in its warehouse without notice to the consignee, the freight will become due as soon as such deposit is made, and the carrier may, no doubt, sue the consignee or owner of the goods before he has taken possession of them. But if the carrier is required to hold them a reasonable length of time for the consignee, or is required to give him notice of their arrival, no suit could be brought for a personal recovery of the freight until such reasonable time had elapsed or such notice was given, and reasonable opportunity, after such notice, to come or send for the goods. Until such opportunity or time is given, as has been stated,³⁹ the carrier continues in the custody of the goods as carrier, and a claim of the freight, or its recovery, would be inconsistent with such custody. But when the time and opportunity to take the goods have been given, the relation of carrier ceases, and that of warehouseman begins; and having done

37. *The Eddy*, 5 Wall. 481.

No notice is necessary when the consignee has actual knowledge of the arrival of the ship, and the carrier's right to freight will be complete when he lands the goods

in a proper manner. *The Ravensdale*, 75 Fed. 408, 410, 413.

38. *Railroad Co. v. Hall*, 69 Ill. App. 497; *Railroad Co. v. Carlock*, 69 Ill. App. 498.

39. *Ante*, §§ 689, 708.

all that the law required of him as carrier, the right to his compensation as such becomes perfect.

Sec. 830. (§ 471.) When the shipper may recover freight paid in advance.—If the freight be paid in advance, and the goods be not carried, there is a failure of the consideration, and the money may be recovered by the shipper,⁴⁰ unless it be otherwise agreed between the parties, or the failure to carry be attributable to the fault of the party who owns or controls them. But if the carriage has been partly effected, and the circumstances be such that the carrier is entitled to an apportionment of the freight, he would be compelled to refund only such a proportion of the money as he had not earned.

Sec. 831. (§ 472.) Parties may agree for prepayment.—It is, however, competent for the parties to agree that the freight shall be due before the completion of the carriage, or that the money thus paid in advance shall, in any event, belong to the carrier, and a number of instances are reported in which such was the agreement.⁴¹ And the money may not be paid strictly in the character of freight. "There is no doubt but that a man may agree to pay money on the delivery of the goods on board the ship, call it what you will."⁴² But such a stipula-

40. *Benner v. The Ins. Co.*, 6 Allen, 222; *Chase v. The Ins. Co.*, 9 *id.* 311; *Pittman v. Hooper*, 3 Sumn. 50; *Watson v. Duykinck*, 3 Johns. 335; *The Kimball*, 3 Wall. 37; *The Bird of Paradise*, 5 *id.* 545; *Lawson v. Worms*, 6 Cal. 365; *Griggs v. Austin*, 3 Pick. 20; *Phelps v. Williamson*, 5 Sand. 578; *Brown v. Harris*, 2 Gray, 359; *The Schooner Arthur B*, 1 Alaska, 403.

question; nor is parol testimony admissible to vary a complete bill of lading, which in connection with this firmly established rule of law, requires the repayment of the freight paid in advance and not earned. *De Sola v. Pomares*, 119 Fed. 373.

41. *De Silvale v. Kendall*, 4 M. & S. 37; *Jackson v. Isaacs*, 3 H. & N. 405; *Hicks v. Shield*, 7 El. & B. 633; *Kinsman v. The Ins. Co.*, 5 Bosw. 460; *Mashiter v. Buller*, *supra*.

A local custom that freight prepaid is in no event to be returned in case of loss of the vessel on the voyage, even if proved, would not operate to overcome such a well settled rule of law as the one in

42. Per Gibbs, C. J., in *Andrew v. Moorhouse*, 5 Taunt. 435. On right to freight made payable after final sailing from last port,

tion should be expressed in terms so clear and unambiguous as to leave no doubt that such was the intention.

Sec. 832. (§ 473.) Consignee liable for detention of the carrier by water—Demurrage.—It being the duty of the consignee to be in readiness to receive the goods, he will be liable to the carrier by water for compensation for any detention which may be caused by his fault in not promptly accepting them after he has notice that the carrier is prepared to deliver them. When a stipulation is made upon the subject in the contract of affreightment, as is frequently done where the carriage is by water, the compensation for the delay to which the carrier becomes entitled under the agreement is called demurrage. Strictly speaking, this is the only meaning of demurrage, but the word is also often used to denote those damages which may become due when the vessel is detained beyond the agreed number of demurrage days or beyond a reasonable time for loading or unloading when the charter party or bill of lading does not stipulate for days on demurrage.

The measure of damages in the case of improper detention of a vessel is not fixed and certain, but the damages to be allowed are dependent upon the circumstances. If the vessel is not employed, and no hire is to be obtained, no damages are sustained. If the vessel is under contract, or can obtain employment, the net earnings may furnish the rule. Where, however, the vessel is detained with full crew and cargo on board, all expenses going on, the earnings furnish decided assistance in determining the damages.⁴³ In those cases, of course, where demurrage days are provided for and a rate of demurrage agreed on, that rate is *prima facie* the standard by which the ship-owner's loss can be measured, but either party may show that it is not the correct standard, and that another one is right and just under the circumstances of the particular case.⁴⁴

see *Price v. Livingston*, 9 Q. B. 122 Fed. 218, 58 C. C. A. 664; Div. 679; *Garston Co. v. Hickie*, *Huron Barge Co. v. Turney*, 79 Fed. 109; s. c. 71 Fed. 972.

43. *Keyser & Co. v. Jurvelins*,

44. *Moorsom v. Bell*, 2 Camp. 616.

A prior agreement between the shipper and vessel owner as to the rate of demurrage will not be changed by the delivery of a form of bill of lading stipulating for a different rate, such form having been used by mistake and without intention to change the original agreement.⁴⁵ And if a stipulated sum is agreed on as demurrage for each day's delay in delivering cargo to a vessel, but the charter party is silent as to delay in loading, the rate of demurrage stipulated for in the case of delivery will furnish *prima facie* evidence of the loss occasioned by an unexcused delay of the charterer in loading.⁴⁶

Sec. 833. Same subject—Effect of charterer's stipulation to load or unload within a fixed time.—It is universally held that a stipulation in a contract prescribing a time within which an act or thing is to be done or performed by one of the parties thereto, made in unqualified terms (time being of its essence) is absolute in its obligation and cannot be excused or avoided by the party bound by reason of any obstacle or impediment to its performance, no matter how far beyond the control of such party the existence of such obstacle or impediment may be. If a charterer binds himself absolutely to load or unload within a certain time, he takes the risk of all unforeseen circumstances. He bears the risk of delay arising from the crowded state of the place at which the ship is to load or discharge, or bad weather preventing access to the vessel. And it is immaterial that the ship-owner, also, is prevented from doing his part of the work within the agreed time, unless he is in fault.⁴⁷

45. *Burns v. Burns*, 125 Fed. 432; *affirmed*, 131 Fed. 238, 65 C. A. 224. *McChesney*, 70 N. Y. Supp. 195, 60 App. Div. 590; *Pregenzer v. Burleigh*, 26 N. Y. Supp. 35, 6

46. *Baldwin v. Timber Co.*, 65 Hun, 625, 20 N. Y. Supp. 496. *Misc.* 140; *Booye v. A Cargo of Dry Boards*, 42 Fed. 335; *Actiesel-*

47. *Hagar v. Elmslie*, 107 Fed. 511, 46 C. C. A. 446, *affirming* *Elmslie v. Hagar*, 101 Fed. 840; *Empire Transp. Co. v. Coal & Iron Co.*, 77 Fed. 919, 40 U. S. App. 157, 23 C. C. A. 564, 35 L. R. A. 623, *affirming* 70 Fed. 268; *Gabler v. kabet Barford v. Lumber Co.*, 125 Fed. 137; *Midland Nav. Co. v. Elevator Co.*, 6 Ont. L. R. 432; *Maclay v. Spillers & Baker*, 6 Com'l Cas. 217.

Where there is an absolute contract of the charterer to pay de-

But if, by the terms of the charter party, it is only for "detention by default of" the charterers or their agent that they agree to pay the amount of demurrage specified in the charter, a detention which is caused, not by any act of the ship-owners or of the charterers, but wholly by the actual firing of guns from an enemy's ship of war upon the forts in the harbor, directly affecting the vessel and making the discharge dangerous and impossible, cannot be considered as caused by "default" of the charterers.⁴⁸ *

Clauses in a bill of lading providing for special demurrage in exceptional cases should be strictly construed, and being in the nature of a penalty ought not to be imposed unless the case comes clearly within the purpose which those clauses were intended to accomplish.⁴⁹

demurrage for delay and detention of the ship during unloading, a strike of the dock laborers not caused by unreasonable conduct of the shipowners or those for whom they are responsible will not relieve the charterer from unloading within the designated number of lay days. *Budgett & Co. v. Binnington & Co.*, 25 Q. B. D. 320, (1891) 1 Q. B. 35, 60 L. J. Q. B. 1.

Where a cargo is to be delivered within reach of the ship's tackle, the charterers are not exempted from demurrage by a breakdown of one of the lighters. *James v. Brophy*, 71 Fed. 310, 18 C. C. A. 49, 33 U. S. App. 330.

A stipulation for definite lay days makes the charterer responsible for delay caused by a fire at the dock which destroys the machinery depended on for loading. *Huron Barge Co. v. Turney*, 71 Fed. 972; *s. c.* 79 Fed. 109.

A delay caused by the vessel waiting her turn to be berthed is not "a cause or accident beyond

the control of the consignees" within the meaning of the clause in a charter party exempting the charterer from liability for demurrage in such a case, where the charter party also provides that the vessel is to be discharged at a fixed rate after she is ready to unload, whether in berth or not. *Steamship Co. v. 2,000 Tons of Coal*, 124 Fed. 937; *affirmed* in *Niver Coal Co. v. Cheronea S. S. Co.*, — C. C. A. — 142 Fed. 402. (This case also held that a strike was not the proximate cause of the delay within the meaning of an exception against "strikes.")

48. *Crossman v. Burrill*, 179 U. S. 100, 21 Sup. Ct. R. 38, 45 L. Ed. 106, *reversing* *Burrill v. Crossman*, 91 Fed. 543, 33 C. C. A. 663 and 65 Fed. 104; *Burrill v. Crossman*, 130 Fed. 763, 65 C. C. A. 189, *reversing* 124 Fed. 838 and 111 Fed. 192.

49. *Continental Coal Co. v. Bowne*, 115 Fed. 945, 53 C. C. A. 427.

Sec. 834. Same subject—When delay is caused by default of the ship-owner.—Even though the time for the work is definitely fixed, a charterer or consignee is not liable for delay caused by the default of the ship-owner. Thus where a delay is caused through no failure of the consignee to provide sufficient carts, but by the cargo being delivered from one only of the two hatches of a ship, and not from both hatches, the ship is not entitled to demurrage.⁵⁰ So if the ship-owner refuses or neglects to hire a sufficient number of men to do that part of the work, devolving upon him, within the stipulated time, the ship cannot claim demurrage for consequent delay beyond the stipulated time.⁵¹ And where the stevedoring in discharging a vessel is done by an employe of the ship's agent, the charterer is not responsible for his delays.⁵²

Sec. 835. Same subject—When delay is caused by observance of stipulation inserted for ship-owner's benefit.—If delay is caused through the strict observance of a stipulation inserted in the charter party or bill of lading entirely for the ship-owner's benefit, the ship cannot claim demurrage. Thus when a ship-owner stipulates that his vessel shall be loaded only when she can be kept afloat, and from the nature of the harbor this can be done only when certain high tides occur, time lost, after the arrival of the ship, in waiting for the necessary tides and depth of water must be lost to the ship-owner.⁵³

Sec. 836. Same subject—Delays due to customs officers.—In general, it is the duty of the consignee to procure a permit for the discharge of the cargo from customs officers, and it does not follow that he is excused in all cases because one customs officer omits to deliver the permit to another. But where a delay is caused by the carelessness of a customs officer in mislaying the permit, and the permit is secured by the char-

50. *Ewan v. Tredegar Co.*, 88 Michigan, 68 C. C. A. 372, 135 Fed. 703.

51. *Hansen v. Donaldson*, 1 Sess. Cas. (4th) 1066.

53. *Carlton Steamship Co. v.*

Castle Mail Packets Co., Limited,

L. R. (1898) App. Cas. 486, 67 L.

terer very soon after the discharge has been stopped for want of it, the charterer is not liable for such delay.⁵⁴

Sec. 837. Same subject—What are counted as lay days—“Days”—“Working Days”—“Weather Working Days.”—If the word “days” alone is used with reference to lay days or days for loading a ship, all the running or successive days are counted, including Sundays and holidays.⁵⁵ When Sundays only are excepted from running days, the charterers are not exempt from demurrage for holidays and days on which laborers will not work.⁵⁶

The term “working days” means, in maritime affairs, running or calendar days on which the law permits work to be done. It excludes Sundays and legal holidays, but not stormy days. It does not include time taken off by the baymen in attending the funeral of one of their number, or the cessation of work on Good Friday.⁵⁷

If the parties wish further to except days when the weather permits work, they use the expression “weather working days,” or “with customary dispatch” or some other expression

J. Q. B. 795, *affirming* (1897) 2 Q. B. 485, 66 L. J. Q. B. 819.

54. 2,000 Tons of Coal *ex* The Michigan, 68 C. C. A. 372, 135 Fed. 734.

55. Hughes *v.* Hoskins Lumber Co., 136 Fed. 435; Baldwin *v.* Sullivan Timber Co., 65 Hun, 625, 20 N. Y. Supp. 496.

Days on which those loading the vessel refused to work owing to storms, and days when the labor organizations withdrew their members to attend a funeral and for the celebration of Labor Day, should not be excepted from the days allowed for loading. Hagerman *v.* Norton, 105 Fed. 996, 46 C. C. A. 1.

Half holidays not made obligatory by statute are not to be excluded in computing demurrage

where there is no evidence that the stevedores refused to work because of the state law on that subject and a custom of the port to that effect is not proved by the proper quantity and quality of evidence. Steamshipping Co. *v.* Hagar, 124 Fed. 460; Uren *v.* Hagar, 95 Fed. 493.

56. James *v.* Brophy, 71 Fed. 310, 18 C. C. A. 49, 33 U. S. App. 330.

57. Hughes *v.* Hoskins Lumber Co., 136 Fed. 435; Sorensen *v.* Keyser, 52 Fed. 163, 2 C. C. A. 650, 2 U. S. App. 297, *reversing* 48 Fed. 117; *s. c.* 51 Fed. 30, 2 C. C. A. 92; Wood *v.* Keyser, 84 Fed. 688; *affirmed* in 87 Fed. 1007, 59 U. S. App. 202, 31 C. C. A. 358.

which clearly indicates their intention to recognize that days of inclemency from winds and storms are also excepted.⁵⁸

Sec. 838. Same subject—Parts of days.—If a vessel commences to load or discharge in the middle of the day, a day's time is generally computed at the end of that day and not at the expiration of twenty-four hours from the time of commencement.⁵⁹ But if from all the terms of the charter party or bill of lading the true construction seems to be that fractions of a day are to be taken into account, that construction will be enforced and demurrage will begin to run on the expiration of the fraction of a day.⁶⁰

When the agreement is for "weather working days," and a part only of a weather-working day is in fact used by the charterers on account of the weather, the question often arises whether that part is to be counted against them as a whole day or as part of a day, or whether it is to be excluded from the calculation altogether. "The most equitable view is to charge half a day against the charterers where substantial work is done, though not amounting to half a day, and to charge a full day where substantially a full day's work, though not amounting to twelve hours, is done; no smaller fraction than half a day should, however, be taken into consideration, and if the time worked is quite insignificant, it should not be charged at all."⁶¹

Sec. 839. Same subject—Agreements for "quick dispatch," "customary quick dispatch" and "customary dispatch."—An agreement for "quick dispatch" is, in effect, an agreement for a fixed time in loading or discharging and over-rides any customary mode of doing the work.⁶² Under such an agree-

58. *The India*, 49 Fed. 76, 1 C. v. *Lamport & Holt*, (1897) 1 Q. B. C. A. 174, 2 U. S. App. 83; *Hughes* 570, 66 L. J. Q. B. 382.
v. *Hoskins Lumber Co.*, 136 Fed. In *Weir v. Northwestern Com-*
435. *mercial Co.*, 134 Fed. 991, the

59. *The Katy*, (1895) P. 56.

60. *Yeoman v. The King*, (1904) 2 K. B. 429, 73 L. J. K. B. 904.

61. *Brancelow Steamship Co.* at Nome, Alaska.

62. *Mott v. Frost*, 47 Fed. 82.

ment, therefore, demurrage is allowable for delay in giving security for freight,⁶³ and the charterers take upon themselves the risk of providing at once a berth from which the discharge can take place, it being no excuse to show that, by the custom of the port, vessels there took their turn.⁶⁴

A stipulation that the cargo is to be discharged with all dispatch according to the custom of the port is not necessarily the same as the implied obligation to discharge within a reasonable time.⁶⁵ The words "as customary"⁶⁶ or "with all dispatch as customary"⁶⁷ refer to the customary manner of doing the work and not to the time within which it is to be done.

A provision in a charter party for dispatch in discharging is to be construed with reference to the custom of the port where the discharge is made, which is fixed in a large measure by the facilities at such port for discharging the kind of cargo carried.⁶⁸ Thus, "customary quick dispatch" at the port of Philadelphia, in unloading a cargo of sugar, would require the use of platform scales for weighing, and is not complied with by the tedious method of weighing on "sticks."⁶⁹

A contract to discharge with "customary dispatch" is fulfilled if the vessel is afforded the customary facilities for speedy discharge.⁷⁰ But it cannot be held to include any de-

63. *The Dixie*, 46 Fed. 403.

354, 14 C. C. A. 656, 28 U. S. App.

64. *In re* 10,082 Oak Ties, 87 Fed. 935.

383, *affirming* 50 Fed. 565.

65. *Pantland Hick v. Raymond & Reid L. R.* (1893) App. Cas. 22, 62 L. J. Q. B. 98, *affirming* (1891) 2 Q. B. 626.

70. Hence if the customary facilities are furnished and a delay occurs on account of the ship's stevedores, who, through misapprehension and without the knowledge of the charterers, occasion delay by separating the goods of the various consignees, thus taking up more dock room and making the cargo difficult to unload, the charterer will not be liable for the delay so occasioned. *Seagar v. Steamship Co.*, 55 Fed. 324; *affirmed* in 55 Fed. 880, 5 C. C. A.

66. *The Nifa* (1892) P. 411; *Dunlop v. Balfour*, (1892) 1 Q. B. 507.

67. *Castlegate Steamship Co. v. Dempsey*, (1892) 1 Q. B. 854, 61 L. J. Q. B. 620, *reversing* (1892) 1 Q. B. 54, 61 L. J. Q. B. 263.

68. *The Cargo of The Joseph W. Brooks*, 122 Fed. 881.

69. *Smith v. Harrison*, 67 Fed.

290, 14 U. S. App. 352.

lay which is voluntary on the part of the charterers, although such delay is customary for the class of cargo carried. The phrase must be confined in its meaning to excuse the parties for want of opportunity by reason of the custom prevailing at the port. It would include all those usages which the carrier cannot control such as the working hours, the order in which vessels must come up to the wharf and the observance of holidays, but would not include a custom whereby all cargoes of fruit are sold at auction by one firm, not more than one cargo being sold in one day, and no cargo being discharged until it has been thus sold, and the cargo is liable for demurrage caused by such a custom.⁷¹ Nor does it or any equivalent phrase admit of a detention to suit the convenience or business purposes of consignor and consignee.⁷²

Sec. 840. Same subject—Agreements to load or discharge “as fast as steamer can deliver.”—A clause in a charter party providing that the cargo is to be discharged “as fast as the steamer can deliver” is not tantamount to fixing a certain definite number of days or hours as the period within which the discharge of the vessel is to be accomplished. Such words point “to the discharge of the cargo with the utmost dispatch practicable, having regard to the custom of the port, the facilities for delivery possessed by the particular vessel under contract of affreightment, and all other circumstances in exist-

71. *Milburn v. 35,000 Boxes*, 57 Fed. 236, 6 C. C. A. 317, 14 U. S. App. 562.

72. In *Egan v. Barclay Fibre Co.*, 61 Fed. 527, both sides of a ship could have been used for unloading two vessels, but for his own convenience the consignee used only one. One vessel was consequently detained until the other vessel was unloaded and demurrage was allowed for such detention. See also, *The Glenfinlas*, 48 Fed. 758, 1 C. C. A. 85, *modifying* 42 Fed. 232.

In *Smith v. Roberts*, 67 Fed. 361, 14 C. C. A. 417, 28 U. S. App. 389, the consignees had in port at that time a number of other vessels whose cargoes they were unloading, and, for their own convenience, they chose to furnish to those vessels weighers who might have been employed in discharging the first vessel and should have been so used in order to give that vessel the dispatch to which she was entitled under the charter party. Demurrage was allowed for the delay.

ence at the time, not being circumstances brought about by the person whose duty it is to take delivery or circumstances within his control."¹ But such words will not be controlled by a custom of a port fixing the rate of discharge at a less amount than the ship's full capacity.²

A clause in a charter party providing that a vessel is to be loaded as fast as she can receive the cargo is not affected by weather conditions, even if adverse,³ nor is it complied with by providing a wharf at which she can use only one of her several hatches.⁴ A clause providing that the cargo is to be furnished "at port of loading as fast as vessel can receive and properly stow same in suitable hours and weather" does not refer to hours and weather elsewhere than at the port of loading. The fact that a cargo of lumber got wet, and therefore unfit to ship, through a local rain at the storage yards of the shipper, twelve miles from the port of loading, could not on that account be availed of to excuse a delay so occasioned.⁵

Sec. 841. Same subject—Charterer's liability may be restricted by exceptions—"Strikes"—"Droughts"—"Political occurrences," etc.—It is entirely competent in a charter party which imposes a liability on the charterer for demurrage to provide exceptions in the case of delay, ascribable to specified causes such as quarantine, flood, storms, strikes, fire and other

1. *Hulthen v. Stewart & Co.*, L. three. The charterers were held R. (1903) App. Cas. 389, 72 L. J. liable for the consequent delay. K. B. 917, *affirming* (1902) 2 K. B. *Hine v. Perkins*, 55 Fed. 996, 5 199, 71 L. J. K. B. 624, 86 Law C. C. A. 377, 14 U. S. App. 386, T. 397, 50 Wkly. Rep. 538; *The reversing The Nether Holme*, 50 *Jaederen*, L. R. (1892) P. 351, 61 Fed. 434.
L. J. P. 89; *Good v. Isaacs*, (1892) 2. *The Glenfinlas*, 48 Fed. 758, 2 Q. B. 555, 61 L. J. Q. B. 649, 67 1 C. C. A. 85, *modifying* 42 Fed. L. T. 450; *Wyllie v. Harrison*, 13 232.
Sess. Cas. (4th) 92. 3. *Steamship Co. v. Guggenheim*, 123 Fed. 330.

A charter party provided that the vessel should "discharge as fast as she can deliver in ordinary working hours." The vessel had four hatches from which she could discharge, but was sent to piers where she could use but

4. *McCaldin v. Cargo of Scrap Iron*, 111 Fed. 411.

5. *Durchmann v. Dunn*, 106 Fed. 950, 46 C. C. A. 62, *affirming* 101 Fed. 606.

occurrences, and the courts in enforcing those exceptions will give a reasonable meaning to the exonerating language.⁶ Thus a demand made by the workmen on the charterers that they should be compelled to pay an advance in wages, made in the midst of loading, after the contract between the charterers and the owners had been made upon the basis of the wages formerly paid, and a refusal to work unless the demand is acceded to immediately, is clearly a strike within the meaning of an exception in the charter party exempting the charterers from liability for demurrage in that event.⁷ And when "strikes" have been excepted, merchants should not be held liable for demurrage, even though an alleged strike was brought about by the demands of the merchants that the laborers engaged in loading the vessel should conform to certain rules and regulations which were perfectly reasonable in themselves. Asquiescence in certain customs of the laborers for some time is not a waiver by the merchants of their rights to insist upon an abandonment of such customs if the same are unreasonable.⁸ But a delay in obtaining a berth at a port, because of the large number of vessels unloading coal brought from foreign countries owing to a domestic shortage caused by a strike of miners, is not caused by "strikes" within an exception in the charter party. The connection of the strike with the delay is too remote.⁹

An exception against "strikes" is not affected by the fact that a strike is in progress at the time the contract is signed. If the ship-owner agrees to such an exception he must abide by its results.¹⁰

An exception against "droughts" does not apply to time

6. *Actieselskabet Barford v. Lumber Co.*, 125 Fed. 137.

7. *Wood v. Keyser*, 84 Fed. 688; *affirmed* in 87 Fed. 1007, 59 U. S. App. 202, 31 C. C. A. 358.

8. *Hawkhurst Steamship Co. v. Keyser*, 84 Fed. 693; *affirmed* in 87 Fed. 1005, 31 C. C. A. 347, 59 U. S. App. 211.

9. *Steamship Co. v. 2,000 Tons of Coal*, 124 Fed. 937; *affirmed* in *Niver Coal Co. v. Steamship Co.*, — C. C. A. —, 142 Fed. 402.

10. *Dobell & Co. v. Green & Co.*, (1900) 1 Q. B. 526, 69 L. J. Q. B. 454, 82 Law T. (N. S.) 314, 5 Com'l Cas. 161.

lost by the charterers in failing to procure and have ready at the usual place of storage a cargo on account of a drought which was prevailing before the charter of the ship, and which affected the rivers flowing through the country from which cargoes were ordinarily procured, but which did not affect in any way the delivery of cargoes from the place of storage to the ship.¹¹

Along the same line it has been held that "political occurrences" which prevented the charterer from procuring a cargo, but did not prevent him from loading any cargo he might procure, did not relieve him from liability for demurrage.¹² This rule does not seem to be enforced so strictly in England, however, as an exception against "political disturbances or impediments" has been held to apply to the impossibility of keeping railways running owing to civil war.¹³

11. *Jonasen v. Keyser*, 112 Fed. 443, 50 C. C. A. 334; *Sorensen v. Keyser*, 52 Fed. 163, 2 C. C. A. 650, 2 U. S. App. 297, *reversing* 48 Fed. 117; *s. c.* 51 Fed. 30, 2 C. C. A. 92; *The India*, 49 Fed. 76, 1 C. C. A. 174, 2 U. S. App. 83.

12. 1,600 Tons of Nitrate of Soda *v. McLeod*, 61 Fed. 849, 10 C. C. A. 115, 15 U. S. App. 369.

A refusal of the captain of a foreign port to permit a vessel to berth in her turn at the pier in a berth where she would project beyond the pier is an "intervention of constituted authorities." *Adamson & Mail v. 4,300 Tons of Pyrites Ore*, 137 Fed. 998.

13. *Smith v. Rosario Nitrate Co.*, (1894) 1 Q. B. 174, (1893) 2 Q. B. 323.

See also, *Furness v. Forwood*, 77 Law T. (N. S.) 95, 2 Com'l Cas. 223. In this case an action was brought against the charterers to recover damages for not supplying goods in accordance

with the terms of the charter

party. Among the exceptions against liability for delay in loading the vessel were "floods, stoppages of trains, miners or workmen, accidents to railways and to mines or piers from which the ore is to be shipped." The ore could only be brought from the mines to the pier by railway lines, and was not generally brought until it was wanted for shipment. No cargo could be supplied to the vessel in consequence of the breakdown of the railway communications between the mines and the pier caused by storms and floods, and the vessel sailed away without cargo. It was held that the exceptions in the charter party applied not only to causes operating at the port of loading, but also to causes operating to prevent the ore being brought from the mines to the pier and that the charterers were protected by the exceptions.

When the particular dangers or risks against which the charterer has specifically guarded himself in the charter party are followed by more general and comprehensive words of exception, the latter are to be construed to embrace only occurrences *ejusdem generis* with those previously enumerated. unless there be a clear intent to the contrary. Thus where the charter party excepted, among other things, "strikes, lockouts, accidents to railway" and also "other causes beyond charterer's control" the general clause excepting "other causes beyond charterers' control" referred to matters *ejusdem generis* with the antecedent exceptions, and an inability to obtain a sufficient number of laborers when wanted was held not to be *ejusdem generis* with a lockout.¹⁴

Sec. 842. Effect when contract is silent as to time of loading or discharge.—Demurrage, strictly speaking, can be recovered only when it is expressly reserved by the charter or bill of lading. But one who charters a vessel, under a contract that is silent as to the time of unloading and discharge, contracts by implication that he will unload and discharge her within a reasonable time in view of all the existing facts and circumstances, ordinary and extraordinary, legitimately bearing upon that question at the time of her arrival and discharge. This implied contract to discharge the vessel is, in effect, a contract to discharge her with reasonable diligence.¹⁵ And the same rule applies

14. *In re Richardsons*, (1898) 1 Q. B. 261, 66 Law J. Q. B. 868, 77 Law T. 479, 8 Asp. 330. 626; *Midland Nav. Co. v. Elevator Co.*, 6 Ont. L. R. 432.

15. *Empire Transportation Co. v. Coal & Iron Co.*, 77 Fed. 919, 23 C. C. A. 564, 40 U. S. App. 157, 35 L. R. A. 623, *affirming* 70 Fed. 268; *In re 2,098 Tons of Coal*, 135 Fed. 317, 67 C. C. A. 671; *Ionia Transportation Co. v. 2,098 Tons of Coal*, 128 Fed. 514; *Pantland Hick v. Raymond & Reid*, L. R. (1893) App. Cas. 22, 62 L. J. Q. B. 98, *affirming* (1891) 2 Q. B. 626; *Midland Nav. Co. v. Elevator Co.*, 6 Ont. L. R. 432. There is no such thing as a reasonable time in the abstract. It must always depend upon circumstances. What may without impropriety be called the ordinary circumstances differ in different ports at different times of the year. As regards the practicability of discharging a vessel they may differ in summer and winter. Again, weather increasing the difficulty of, though not prevent-

as well in the loading of a vessel as in her discharge.¹⁶

The burden is on him who seeks to recover damages for the delay of a vessel, under such a contract, to prove that the charterer did not exercise reasonable diligence to load or discharge her, under the actual circumstances of the particular case.¹⁷ But proof that the vessel was delayed in unloading beyond the customary time for unloading such cargoes at the port of loading or delivery throws upon the charterer the burden of excusing the delay by proof of the actual circumstances and his reasonable diligence thereunder.¹⁸

ing the discharge of a vessel may continue for so long a period that it may justly be termed extraordinary. *Pantland Hick v. Raymond & Reid, supra.*

Where the charter is silent as to the time of discharge, a strike of the employes of the charterer, without grievance or warning, and an organized and successful effort on their part to prevent by threats other laborers who were willing to do so, from discharging a vessel, will excuse the charterer for the delay of a week in the performance of that work. *Empire Transportation Co. v. Coal & Iron Co., supra.* See also, *Hick v. Rodocanachi*, (1891) 2 Q. B. 626; *affirmed* (1893) A. C. 22.

Where the wharves in a port are not equally convenient for the discharge of every sort of cargo, and no custom has been proved which requires the court to disregard the difference among them, a reasonable rate of discharge is not necessarily the same at all wharves and under all circumstances. Doubtless a wharf may be so inconveniently arranged or constructed that the consignee will be responsible for the delay in discharging thereat, but the

reasonable convenience required of a wharf is not the same thing as the highest degree of convenience either imaginable or actually existing. *The James Baird*, 90 Fed. 669.

The failure to fill the blanks relating to demurrage ordinarily leaves the rights of the parties with respect to demurrage to be determined by the general rule as to reasonable dispatch. Such condition of the bills of lading does not show that no demurrage was to be charged. *Price v. Morse, etc., Co.*, 120 Fed. 445; *Donnell v. Amoskeag Mfg. Co.*, 118 Fed. 10, 55 C. C. A. 178.

16. *Randall v. Sprague*, 74 Fed. 247, 21 C. C. A. 334, 33 U. S. App. 464, *reversing* 67 Fed. 604; *Corrigan v. Iroquois Furnace Co.*, 100 Fed. 870, 41 C. C. A. 102.

17. *Empire Transportation Co. v. Coal & Iron Co.*, 77 Fed. 919, 23 C. C. A. 564, 40 U. S. App. 157, 35 L. R. A. 623, *affirming* 70 Fed. 268; *Morgan v. Coal Co.*, 113 Fed. 520.

18. *Empire Transportation Co. v. Coal & Iron Co., supra.*

To be valid, a custom of a port as to the rate of discharge must not only be established and rea-

A lack of diligence at one time and an extraordinary amount of diligence at another time on the part of the charterer cannot be averaged. The law requires that the charterer use reasonable diligence at all times.¹⁹

Sec. 843. Same subject—Demurrage not allowable for contemplated delays.—No doubt it is good law that if the performance of a contract is rendered impossible by the act of one of the parties to it, the other party is excused; and it is also good law that if one of the parties unduly delays the performance by the other, he forfeits his own right to complain of the delay, and probably also renders himself liable to make good any damage the other may suffer by the delay.²⁰ But these rules must be applied with reference to the circumstances of each case, and must be read with reasonable limitations. If it appears that the delay complained of was such as both parties ought to have contemplated when the contract was entered into, then no complaint can be based upon it.²¹

Sec. 844. Same subject—When loading or discharge is left to third person.—The work of loading or discharging a ship is usually a joint obligation on the part of the shipowner on the one hand and the charterer or consignee on the other, each performing his individual part and their duties being recipro-

sonable, but certain and definite. 446, *affirming Elmslie v. Hagar*, 101 Fed. 840. It cannot fluctuate between a low minimum and a high maximum. The *James Baird*, 90 Fed. 669.

19. *Aberdeen, etc. Co. v. Macken*, (1899) 2 I. R. 1; *Avon S. S. Co. v. Leask*, 18 Sess. Cas. (4th) 280.

20. A delay caused by the failure of the charterer to notify his agent at the port of destination of his agreement to attend to the entering of the ship at the custom house upon her arrival and by the consequent failure of that agent to act, will be included in the lay days allowed by the charter for discharging. *Hagar v. Elmslie*, 107 Fed. 511, 46 C. C. A.

So a charterer is liable for demurrage for delay caused by loading and then unloading a quantity of iron not intended to be shipped, which an employe of the charterer erroneously designated as part of the cargo. *Creighton v. Dilks*, 49 Fed. 107.

21. *Barque Quilpue, Limited v. Brown*, (1904) 2 K. B. 264, 73 L. J. K. B. 596; *Jones, Limited v. Green & Co.*, (1904) 2 K. B. 275, 73 L. J. K. B. 601; *Harrowing v. Dupre*, 7 Com'l Cas. 157; *The J. E. Owen*, 54 Fed. 185; *Hagan v. Tucker's Exec'r*, 118 Fed. 731, 55

cal. But when that work is left entirely to a third person, as to a dock company, and the charterer's or consignee's obligation is only to complete the work with reasonable diligence, he will not be liable for any delay caused by the third person doing the work, unless the delay was occasioned through him.²²

Sec. 845. Same subject—Charterer must have cargo ready for loading.—There is a strict obligation on the part of the charterer to have the cargo ready for loading,²³ except in those cases where the duty to do so has been modified by a controlling usage,²⁴ or has been expressly excused. But where the charter party provides for demurrage to be paid at a specified rate, "lay days to count from the time the master has got ship reported, berthed and ready to receive cargo, and given notice of the same in writing to the charterers," and owing to the cargo of an earlier vessel not being ready there is only a chance of a berth becoming vacant, there is no obligation on the part of the charterers to have the cargo on the quay and ready for loading. The charterer is ordinarily bound, however, to do whatever is reasonable with a view to getting the ship berthed at the earliest period possible; and it may be that under certain circumstances, owing to the custom of the port or to the provision that is made to facilitate the cargo remaining there for a time, or to some other circumstance, it would be the duty of the charterer to prepare the cargo so as to enable the ship to obtain an earlier berthing than would otherwise be obtained. But such facts must be affirmatively shown in order to charge the charterer with liability for demurrage.²⁵

Sec. 846. Same subject—Charterer's duty to provide appliances for loading or unloading.—A charterer is bound to

C. C. A. 521, *affirming* 112 Fed. 546.

22. *The Jaederen*, L. R. (1892) P 351, 61 L. J. P. 89; *Castlegate Steamship Co. v. Dempsey*, (1892) 1 Q. B. 854, 61 L. J. Q. B. 620, *reversing* (1892) 1 Q. B. 54, 61 L. J. Q. B. 263.

23. *Grant v. Coverdale*, 9 A. C. 470; *Kay v. Field*, 8 Q. B. D. 594; 10 Q. B. D. 241.

24. *Randall v. Sprague*, 74 Fed. 247, 21 C. C. A. 334, 33 U. S. App. 464, *reversing* 67 Fed. 604.

25. *Little v. Stevenson*, (1896) App. Cas. 108, 65 L. J. P. C. 69.

provide such appliances for loading or unloading as are in ordinary use at the port for the kind of cargo to be handled.²⁶ Where only one set of apparatus for unloading is available at a port, however, a usage of the port controlling the use of that apparatus will be binding on the shipowner in the absence of an express agreement to the contrary, and the charterer will not be liable for delay occasioned through compliance with that usage.²⁷

A vessel has the right to assume that dockage for piling the cargo will be supplied with reasonable promptitude by the charterer.²⁸ But the rule is different as to the vessel's rights against a consignor, not a charterer. Where a bill of lading is silent as to who is to furnish means of dockage, presumably the boat is to discharge by her own tackle or the consignee is to provide the means. No action for demurrage for delay in securing proper dockage will therefore lie against the consignor, since the vessel owner takes the risk of finding suitable dockage, depth of water and discharging facilities.²⁹

When the charterers have used every endeavor to procure the necessary customary port appliances for loading or discharging the cargo, they will not be liable for demurrage for a delay in securing those appliances due to causes beyond their control or to regulations of the constituted port authorities.³⁰

26. *Wright v. New Zealand Shipping Co.*, 4 Ex. D. 165.

27. *Postlethwaite v. Freeland*, 5 App. Cas. 599.

As it is as much the shipowner's duty to deliver as it is the duty of the charterer to receive the goods, the shipowner must provide such apparatus as is necessary for his part of the work. But it is doubtful whether a shipowner can be compelled to supply electric lights where kerosene lamps cannot be used on account of the inflammable cargo. Especially is this true where the charterer or his agent does not point out the facilities needed and

demand the same of the ship. *Matthias v. Beeche*, 111 Fed. 940.

28. *Williscroft v. Cargo of The Cyrenian*, 123 Fed. 169.

29. *Jameson v. Sweeney*, 66 N. Y. Supp. 494, 32 Misc. 645; s. c. 61 N. Y. Supp. 498, 29 Misc. 584.

Demurrage will be allowed where there has been an unreasonable delay of a steamer and its tow for 2½ days through failure of the consignee to provide necessary facilities for a speedier discharge of the cargoes. *McArthur Bros. v. 622,714 Feet of Lumber*, 131 Fed. 389.

30. *Wyllie v. Harrison*, 13 Sess. Cas. (4th) 92; *The Jaederen*, L.

Sec. 847. Same subject—"In regular turn."—The words "in regular turn" in a charter party *prima facie* mean the regular turn of the port of lading. But it may be shown, either from the construction of the charter party itself or by evidence, that the words were intended to have a different meaning, as for instance, to mean the regular turn of a colliery.³¹

By universal rule vessels arriving first are entitled to priority in loading,³² so that a custom of a local port that a vessel should wait her turn for a berth is valid.³³ But a usage, although it may control the mode of performance of a contract, cannot change its intrinsic character; and a vessel which stipulates for a specific right as to the order of being loaded cannot be submitted to usages which leave her no definite rights whatsoever. Thus a provision in a charter party that the vessel should be loaded by a coal company "in turn" must be strictly construed, and is not affected by a practice of the company to give preference to its own vessels, or to sell coal to the local customers from the supply which would otherwise have been available for loading at its docks, to the delay of the chartered vessel.³⁴

When the entire cargo of a vessel is consigned to one person and deliverable to him, and the bill of lading fails to point out the specific wharf or berth at which it is to be discharged, the consignee has a privilege of selecting the place of discharge and the vessel's right to precedence, or what is the same thing, her turn is subject thereto. Nevertheless, this

R. (1892) P. 351, 61 L. J. P. 89; 714 Feet of Lumber, 131 Fed. 389.
 Good & Co. v. Isaacs, (1892) 2 Q. B. 555, 61 L. J. Q. B. 649, 67 L. T. 450; Lyle Shipping Co. v. Cardiff Corporation, (1900) 2 Q. B. 638, 69 L. J. Q. B. 889, 83 Law T. (N. S.) 329, 5 Com'l Cas. 397; Moore & Co. v. United States, 38 Ct. Cl. 590.

31. Barque Quilpue, Limited, v. Brown, (1904) 2 K. B. 264, 73 L. J. K. B. 596.

32. McArthur Bros. Co. v. 622,

33. The Viola, 90 Fed. 750; Randall v. Sprague, 74 Fed. 247, 21 C. C. A. 334, 33 U. S. App. 464, reversing 67 Fed. 604; Bartlett v. A Cargo of Lumber, 41 Fed. 890.

34. Donnell v. Amoskeag Mfg. Co., 118 Fed. 10, 55 C. C. A. 178; see also, Railroad Co. v. Church, 58 Fed. 600, 7 C. C. A. 384, 5 U. S. App. 484; The Viola, 90 Fed. 750.

does not give the consignee an arbitrary right, but only one which is just and reasonable. Where several vessels are to load or discharge cargoes of the same generic class, they are apparently entitled, in their turn, to the first berths available, but it may be shown that the particular circumstances were such as reasonably justified the consignee directing otherwise.³⁵

Sec. 848. Same subject—Necessity of notice of vessel's readiness.—Lay days at the port of loading do not begin to run against the charterer until the master gives notice to the charterer that his vessel is ready to receive cargo.³⁶ Such a notice can properly be given only after the ship is ready and at her proper place for loading.³⁷

In England the same rule does not apply at the port of discharge, and the master is not bound to notify the charterers or consignees of the arrival of the goods.³⁸ But in the United States, as has been seen in discussing delivery by carriers by water, notice to the charterers or consignees is necessary even at the port of discharge. Notice, however, is usually stipulated for in the charter party or bill of lading. Notice then imposes on the master the duty to bring his vessel to the berth given her, and for any delay in so doing, not arising from the unsuitableness of the berth or its approaches, or fault of the consignee, he is responsible and must bear the loss.³⁹ If time is lost through the arrival of a vessel on a legal half holiday, and the vessel is unable to notify the consignee at once because his place of business is closed, the consignee cannot be held liable for demurrage for such delay unless expressly stipulated for in the charter party. There is no obligation on the part of a consignee to keep his office open on a legal half holiday.⁴⁰

35. *Evans v. Blair*, 114 Fed. 616, 159; *Houlder v. General Steam Nav. Co.*, 3 F. & F. 170; *Nelson v.* 52 C. C. A. 396.

36. *Stanton v. Austin*, L. R. 7 Dahl, 12 Ch. D. 583.
C. P. 651.

37. *Dantzler Lumber Co. v. C. C. A.* 506, 21 U. S. App. 650.

Churchill, — C. C. A. —, 136 40. *Perry v. Spreckels Sugar Refining Co.*, 110 Fed. 777.
Fed. 560.

38. *Harman v. Clarke*, 4 Camp.

Sec. 849. Same subject—Where ship must be lying.—The cases are not in harmony on the question of just where the ship ought to be lying in order for the lay days to commence. The earlier cases held with great unanimity that the vessel must be in a position where the charterer could begin to do his part of the work.⁴¹ Later cases, however, have held that if the voyage is to commence in such a place “as a port or dock, the shipowner may place his ship at the disposition of the charterer, when the ship arrives at that named place, and so far as she is concerned is ready to load, though she is not then in the particular part of the port or dock in which the particular cargo is to be loaded.”⁴² A still later case seems to return to the earlier and better rule and holds that “if by a charter party it is agreed that a ship shall go to a port and there unload, she must, unless otherwise ordered, go to the customary place of discharge in that port. If there is only one customary place of discharge at a port and when the vessel arrives that place is occupied, the vessel is not ‘ready to discharge,’ and the time for delivery does not commence within the meaning of a clause in a charter party to the effect that ‘time for delivery to count when steamer is ready to discharge.’”⁴³

If the contract is for shipping generally to a certain port, the conditions of delivery at the public docks would doubtless have to be taken into consideration; but when the shipment is to a particular party having known special facilities for unloading, that fact enters into the contract, and determines the question of reasonableness in the discharge of the cargo.⁴⁴

Where the obligation of the vessel is to deliver her cargo at a particular dock, the voyage is not completed, nor is her obligation discharged, until she reaches the designated place

41. *Brereton v. Chapman*, 7 p. 582; see also, *Davies v. McBing*, 559; *Brown v. Johnson*, 10 Veagh, 4 Ex. D. at p. 268. *M. & W.* 331; *Kell v. Anderson*, 43. *Sanders v. Jenkins*, (1897) 10 *M. & W.* 498; see also, *Gabler v.* 1 Q. B. 93, 66 L. J. Q. B. 40. *McChesney*, 70 N. Y. Supp. 195, 60 44. *Pioneer Fuel Co. v. McBrier*, 84 Fed. 495, 28 C. C. A. App. Div. 590.

42. *Nelson v. Dahl*, 12 Ch. D. at 466, 55 U. S. App. 181.

of discharge, ready to deliver her cargo. The rule is not applicable, however, if delay in reaching the designated dock is attributable to the active fault of the charterer or the owner of the cargo.⁴⁵

Sec. 850. Same subject—Vessel to proceed to berth “as ordered.”—When the charter party provides that the cargo is to be delivered at any safe berth “as ordered” on arrival in the dock, the words “as ordered” would have no meaning unless they gave the charterer an option to settle the end of the voyage. In such case the option is in the choice of a berth, and the carrying voyage ends, not on the arrival of the vessel in the dock, but on her arrival at a berth as ordered.⁴⁶ If a strike occurs among the dock laborers after the order has been given to go to a certain berth, the charterers will not be liable for a delay occasioned by their refusal for some time to order the vessel to another berth not affected by the strike.⁴⁷ Nor will they be liable for a delay occasioned by the ship being unable to proceed to the designated berth owing to the crowded condition of the dock.⁴⁸

A designation by a charterer of a berth for a vessel, on notice of its arrival in port, is given within a reasonable time when delivered within two or three hours from such notice of arrival.⁴⁹

The master of a vessel, on learning of obstructions likely to injure his vessel at her designated berth, is justified in refusing to go to such berth until it is made safe, and may hold the consignee for the delay.⁵⁰ But demurrage cannot be had where the vessel is knowingly so overloaded by the carrier that she could not reach the dock selected by the consignee with the

45. *In re* 2,098 Tons of Coal, 135 Fed. 317, 67 C. C. A. 671.

46. *Tharsis Sulphur & Copper Co. v. Morel Brothers & Co.*, (1891) 2 Q. B. 647, 61 L. J. Q. B. 11; *Sanders v. Jenkins*, (1897) 1 Q. B. 93, 66 L. J. Q. B. 40.

47. *Bulman v. Dickson*, (1894) 1 Q. B. 179.

48. *Tharsis Sulphur & Copper Co. v. Morel Brothers & Co.*, *supra*.

49. *The St. Bernard*, 105 Fed. 994.

50. *Sutton v. Housatonic R. Co.*, 45 Fed. 507.

load placed on her. The carrier cannot, in such case, cast the burden of his own negligence on the consignee or shipper.⁵¹

Sec. 851. Accident to vessel while waiting on demurrage.—If the charterer has agreed to provide a quay berth on arrival of the vessel at the port of loading, and fails to do so, and an accident happens to the vessel while waiting on demurrage, necessitating her going to another port for repairs, the obligation to pay demurrage is suspended while the vessel is away for repairs, but the running of the lay days is resumed when the vessel returns. The fact that a quay berth falls vacant during her absence which would otherwise have been given to her makes no difference, and the charterer is liable to pay demurrage from the date of her return until the loading is completed.⁵²

Sec. 852. Charterer's liability for delays after loading is completed.—A charterer is not liable for delay which occurs without his fault after the loading has been completed. Thus he would not be liable for demurrage where the ship was frozen in while being loaded, and was detained on that account for some time after the loading was completed.⁵³ But demurrage for detention beyond a reasonable time in loading is not to be refused because, even if loaded on time, the ship would have been prevented by ice from sailing earlier than she did.⁵⁴

Sec. 853. Effect of consignee's acceptance of goods as creating liability for demurrage.—While a consignee, by accepting the goods consigned to him under a bill of lading by which the person receiving the goods is to pay freight, is held bound by an implied contract to pay the freight, yet, unless the bill of lading, either itself or by reference to another instrument, contains also an express provision providing for the

51. *Ronan v. 155,453 Feet of Lumber*, 131 Fed. 345.

53. *Pringle v. Mollett*, 6 M. & W. 80.

52. *Tyne & Blyth Shipping Co. v. Leech, Harrison & Forwood*, (1900) 2 Q. B. 12, 69 L. J. Q. B. 353, 5 Com'l Cas. 155.

54. *Randall v. Sprague*, 74 Fed. 247, 21 C. C. A. 334, 33 U. S. App. 464, reversing 67 Fed. 604.

payment of demurrage, the consignee, by simply accepting the goods, will not thereby become liable for the payment thereof.⁵⁵ At the same time, while not liable strictly for demurrage, yet a consignee of the cargo, who is also the owner thereof, may be liable for damages in the nature of demurrage when the vessel is detained through the fault of the consignee an unreasonable length of time at the port of discharge. In such case, not only must the detention be proved, but the damages and their nature must also be the subject of proof. There is no express contract to refer to for the purpose of computing the amount to be paid on demurrage, and hence, in an action

55. *Dayton v. Parke*, 142 N. Y. 391, 37 N. E. Rep. 642, *reversing* 67 Hun, 137, 22 N. Y. Supp. 613; *Van Etten v. Newton*, 134 N. Y. 143, 31 N. E. Rep. 334, 30 Am. St. Rep. 630, *affirming* 8 N. Y. Supp. 478; *Graham v. Planters' Compress Co.*, 129 Fed. 253; *Merritt & Chapman, etc. Co. v. Vogeman*, 127 Fed. 770, s. c. 143 Fed. 142; *Steamship Co. v. Sharpe & Co.*, 59 L. J. Q. B. 22, (1890) Vol. 24 Q. B. D. 158.

It is well settled that bills of lading which do not mention demurrage, or refer to any provisions of the charter other than those containing freight and average, do not subject indorsees thereof, who receive the goods under them, to any of the other provisions of the charter. They do not give them notice, or render them liable to, the specific provisions of a charter which require a discharge of a certain quantity of cargo per day, or in default thereof, the payment of a specific sum for a longer detention of the vessel; but they are entitled to take the goods within a reasonable time after arrival, and are

liable to pay damages for undue delay in taking them, according to the ordinary rules of law which govern in the absence of specific agreement. *Crossman v. Burrill*, 179 U. S. 100, 21 Sup. Ct. R. 38, 45 L. Ed. 106, *reversing on other points*, *Burrill v. Crossman*, 91 Fed. 543, 33 C. C. A. 663, and 65 Fed. 104.

Where a consignee fails to take the cargo within a reasonable time after arrival, he remains liable for the damages arising from undue delay, according to the ordinary rules of law which govern in the absence of a specific agreement. *Graham v. Planters' Compress Co.*, 129 Fed. 253.

When the master of a canal boat presents bills of lading to the consignee which not only recite the terms of affreightment, but also contain a stipulation for demurrage after the expiration of three days allowed for unloading, by accepting the cargo, with knowledge of the contents of these instruments, the consignee recognizes them as binding contracts which define the rights and liabilities of the several parties thereto,

to recover damages of that nature, proof must be given of their existence and amount.⁵⁶

Sec. 854. Effect of "cesser" clause.—Charter parties usually contain what is commonly known as the cesser clause, such as, "Charterers' responsibility to cease when vessel is loaded, and bills of lading signed," and the question arises how far the claim of the shipowners against the charterers for demurrage is affected by that clause when followed by a lien clause in favor of the shipowners. The rule seems to be that the cesser clause and lien clause are to be read as co-extensive, and in a charter party which contains a clause for cesser of the liability of the charterers, coupled with a clause creating a lien

and he cannot be heard to say that they are not what they purport to be. *Gabler v. McChesney*, 70 N. Y. Supp. 191, 60 App. Div. 583.

If the consignee is the owner of the goods and enters into a contract with the carrier for their transportation, that contract will govern even though the shipper of the goods stipulates in the bill of lading for a different rate of demurrage than that in the consignee's prior contract. *Burns v. Burns*, 131 Fed. 238, 65 C. C. A. 224, *affirming* 125 Fed. 432.

56. *Dayton v. Parke*, 142 N. Y. 391, 37 N. E. Rep. 642, *reversing* 67 Hun, 137, 22 N. Y. Supp. 613; *Van Etten v. Newton*, 134 N. Y. 143, 31 N. E. Rep. 334, 30 Am. St. Rep. 630, *affirming* 8 N. Y. Supp. 478; *Conkling v. Brooklyn Lumber Co.*, 41 N. Y. Supp. 801, 10 App. Div. 404.

Where there is no express contract on the part of the consignees to furnish a wharf, yet, where the consignees have contracted for dispatch in discharge, or for quick dispatch, or that the

number of lay days shall commence on the arrival of the ship in port, there results an implied contract that the consignees shall be responsible for the delays occasioned by failure to promptly secure a wharf for loading or discharging. But where wharves in the port are public, and cannot be controlled by the consignees, and the vessels are compelled by the proper public officials to await their turn, the obligations of the consignees are discharged if, when the vessels obtain a wharf and are ready to discharge, the consignees discharge and receive the goods as rapidly as their contract calls for. *Flood v. Crowell*, 92 Fed. 402, 34 C. C. A. 415.

Where the words "or assigns" are found in the bill of lading, the master understands that the wharf of discharge may not yet have been selected, and there seems no reason why his rights at the wharf of the assignee, to which he is bound to proceed, should differ from his rights at the wharf of the consignee. *The Viola*, 90 Fed. 750.

in favor of the shipowner, the cesser clause is to be construed, if possible, as inapplicable to a liability with which the lien is not commensurate.¹

Sec. 855. Demurrage not allowable where delay is due to shipowner's or master's fault.—A shipowner is not entitled to demurrage where the delay is due to his own default or that of the master of the vessel. This would be true where the master wrongfully refuses to receive more cargo before all of the shipment contracted for has been loaded, and delay is occasioned in settling the matter,² or where a delay occurs through the mistaken claim of the master that the bills of lading are incorrect.³

The consignor who hires a vessel is liable for demurrage, it is true, on account of delay in discharging caused by the refusal of the consignee to receive the cargo for reasons not connected with some default of the carrier,⁴ or for delay arising from the refusal of the consignee to receive the cargo because damaged in transit by an excepted peril, during which delay the consignee was negotiating with the owner to purchase the cargo at a reduced price.⁵ But the consignor is not liable for demurrage where the refusal of the consignee to receive the goods, and the consequent negotiations with the consignor, necessitating a delay, are due to a default of the carrier, not within the excepted perils of the bill of lading, as where there was a shortage of coal through the carrier's negligence and a consequent delay in arriving at a new agreement with the consignee for the acceptance of the short cargo at its actual weight.⁶

1. *Crossman v. Burrill*, 179 U. S. 100, 21 Sup. Ct. R. 38, 45 L. Ed. 106, reversing on other points but affirming on this, *Burrill v. Crossman*, 91 Fed. 543, 33 C. C. A. 663 and 65 Fed. 104; *Schmidt v. Keyser*, 88 Fed. 799, 32 C. C. A. 121; *Clink v. Radford*, (1891) 1 Q. B. 625; *Hansen v. Harrold* (1894) 1 Q. B. 612.
2. *Sewall v. Wood*, 135 Fed. 12,
- 67 C. C. A. 580; *Gould v. Graffin*, 62 Fed. 605.
3. *The Assyria*, 98 Fed. 316, 39 C. C. A. 97; *Wood v. Sewall's Admr.*, 128 Fed. 141.
4. *Sheridan v. Penn. Collieries Co.*, 128 Fed. 204.
5. *Pioneer Fuel Co. v. McBrier*, 84 Fed. 495, 28 C. C. A. 466, 55 U. S. App. 181.
6. *Doherty v. Peal, Peacock &*

For any delay caused by the master's absence from the vessel, the charterer is not responsible in demurrage.⁷ And if the master refuses to deliver the goods until an admittedly extortionate charge for demurrage is paid, the consignee may abandon the goods to the vessel and recover from the vessel the value of the goods, less the lawful charges.⁸

If the master intends to discontinue discharging his vessel until security is given for demurrage, he should give such timely notice of his intention to the charterers as will enable them to furnish the required security without delaying the progress of the work, or he should adopt a means by which prompt discharge may be made and the lien of the vessel retained. No demurrage will be allowed for delay caused by an arbitrary stoppage by the master without such notice.⁹

Under the ordinary rules of law, the owner of a vessel cannot detain the cargo aboard the vessel for non-payment of freight, and by parity of reasoning for non-payment of general average, and thereupon charge demurrage for such detention. It is true that, under some peculiar circumstances, it would be absurd to hold that the master was bound to discharge instant, and, therefore, *quasi* demurrage for a reasonable time might be allowable under such circumstances. Such allowances, however, would not be strictly in consequence of the detention of the cargo aboard the vessel in order to secure a lien, but would arise, according to the flexible methods of the maritime law, out of the special and peculiar circumstances.¹⁰

Sec. 856. Shipowner's lien for demurrage.—There is no lien at common law for demurrage, and that right must arise, if at all, by contract.¹¹ It is otherwise, however, by the maritime law which allows a shipowner a lien without an express contract

Kerr, 54 N. Y. Supp. 1054, 25 Misc. 487.

9. *In re* 10,082 Oak Ties, 87 Fed. 935.

7. *Whitman v. Vanderbilt*, 75 Fed. 422, 21 C. C. A. 422, 38 U. S. App. 693.

10. *Wellman v. Morse*, 76 Fed. 573, 22 C. C. A. 318.

8. *The Reuben Dowd*, 46 Fed. 800.

11. *Phillips v. Rodie*, 15 East, 547; *Burley v. Gladstone*, 3 M. & S. 205; *Gladstone v. Burley*, 2

either for demurrage proper or for damages in the nature of demurrage.¹² But whether a lien arises by express contract or by operation of law, it may be waived by the shipowner. What constitutes such a waiver on the part of the shipowner is a question of fact.

Sec. 857. Waivers of claim for demurrage.—The delivery of the cargo and collection of freight money is not a waiver of the claim for demurrage. “A contractor, by taking what he can get under his contract when he can get it, no more necessarily and as matter of law waives a claim for damages for failure to perform on time than he necessarily waives a defect of quality by accepting goods.” Other circumstances, such as where other security is taken, must be present in order to show an abandonment of the claim.¹³

The presentation of a bill for a smaller amount,¹⁴ or the acceptance by the master of a smaller amount under protest,¹⁵ does not necessarily bar the shipowner from afterwards urging a larger claim for demurrage. Each case must be considered on its own facts.

The common stipulation in a bill of lading that, if the goods are not applied for within twenty-four hours of the ship's arrival, the master or agent is to be at liberty to land the same at the risk and expense of the owner of the goods, and retain a lien for his charges on that account, gives the shipowner an alternative remedy. It does not supersede his right to have the cargo unloaded by the consignee and to hold him liable for delay; nor does it apply to the case where the goods are

Meriv. 401; *Gray v. Carr*, L. R. 6 Q. B. 522. *Railroad Co.*, 166 Mass. 119, 44 N. E. Rep. 119; *Durchmann v. Dunn*,

12. *The Hyperion's Cargo*, 2 Low. 93; *Donaldson v. McDowell*, 1 Holmes, 290; 275 Tons of Mineral Phosphates, 9 Fed. 209; *Hawgood v. 1310 Tons of Coal*, 21 Fed. 681. 106 Fed. 950, 46 C. C. A. 62; *Pioneer Fuel Co. v. McBrier*, 84 Fed. 495, 28 C. C. A. 466, 55 U. S. App. 181. But see 216 Loads and 678 Barrels of Fertilizer, 88 Fed. 984.

13. *Iroquois Furnace Co. v. Elphicke*, 200 Ill. 411, 65 N. E. Rep. 784, *affirming* 102 Ill. App. 138; *Garfield & Proctor Coal Co. v.* 14. *Eikrem v. Coal Co.*, 125 Fed. 987.

15. *Steamshipping Co. v. Hagar*, 124 Fed. 460.

applied for in due time, but the unloading by the consignee is afterwards interrupted.¹⁶

But the right of a shipowner to demurrage may be affected by his laches in bringing suit.¹⁷

Sec. 858. Liability of consignee for detention of cars where duty to unload the goods devolves on railroad company.—

While, under the maritime law, the carrier is entitled to demand compensation for the detention of his vessel which is caused by the delay of the consignee in receiving his goods, it remains to be seen whether a railroad company may impose a similar charge for the detention of its cars. If the goods consist of small or package freight belonging to several owners, and are such that they may be shipped in a single car, or if, though in bulk, they are of such a character as to be subject to damage or deterioration on account of the elements, it is ordinarily the duty of the railroad company to unload them from the car and deposit them in a safe and suitable place before its liability as carrier will cease and that of warehouseman begin; and where the railroad company is under this duty, the question as to a detention of the car by the consignee does not usually arise. But the consignee himself may undertake to unload the goods, and by reason of his failure to do so within a reasonable time the railroad company may seek to hold him liable for demurrage charges. Thus in the case of *Chicago & Northwestern Railway Co. v. Jenkins*,¹⁸ which was later distinguished by the same court from the case of *Schumacher v. The Railway*,¹⁹ the plaintiff brought an action of trover to recover damages for the conversion of a quantity of paper which the defendant had refused to permit him to unload from its car because, as it claimed, demurrage charges which the plaintiff refused to pay had accrued under its published rules. In deciding that the defendant had no right, in

16. *Hick v. Rodocanachi* (1891) 253, 1 C. C. A. 237, 1 U. S. App. 7; 2 Q. B. 626, 61 L. J. Q. B. 42; 18. 103 Ill. 588.

affirmed, (1893) A. C. 22.

19. *Schumacher v. The Railway*, 207 Ill. 199, 69 N. E. Rep. 825, *affirming s. c.* 108 Ill. App. 520.

17. *McKeen v. Morse*, 49 Fed.

the absence of an express contract on the subject, to withhold possession of the paper from the plaintiff, the court said: "The right to demurrage, if it exists as a legal right, is confined to the maritime law, and only exists as to carriers by sea-going vessels. But it is believed to exist alone by force of contract. All such contracts of affreightment contain an agreement for demurrage in case of delay beyond the period allowed by the agreement, or the custom of the port allowed the consignee to receive and remove the goods. But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights. Owners of vessels have none. *Railroads discharge cargoes carried by them. Carriers by ship do not, but it is done by the consignee.* The masters of vessels provide in the contract for demurrage, while railroads do not, and it is seen these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers."

Sec. 859. Same subject—How where duty to unload cars devolves on consignee.—Where, however, the goods consist of bulky freight which is shipped in car load lots, and the consignee, either by contract or by a well established custom, is under the duty of unloading the goods himself, the railroad company is only required to notify him of their arrival and place the cars in a reasonably accessible position for being unloaded. It then becomes the duty of the consignee to unload the goods within a reasonable time, and if he fails to do so, the railroad company will be entitled as a matter of right, or in accordance with its published rules and regulations, to demand a reasonable compensation for the use of the cars, whether they belong to it or to another company.²⁰ And there

²⁰ *Kentucky Wagon Mfg. Co. v. The Railway*, 98 Ky. 152, 32 S. W. Rep. 595, 56 Am. St. Rep. 326, 36 L. R. A. 850; *Miller v. The Railroad*, 88 Ga. 563, 15 S. E. Rep. 316, 30 Am. St. Rep. 170, 18 L. R. A. 323; *Dixon v. The Railway*, 110 Ga. 173, 35 S. E. Rep. 369; *Schumacher v. The Railway*, 207 Ill. 199, 69 N. E. Rep. 825; *Railroad Co. v. Adams*, 90 Va. 393, 18 S. E. Rep. 673, 44 Am. St. Rep. 916, 22 L. R. A. 530; *Miller v. Mansfield*, 112 Mass. 260; *Railroad Co. v.*

is no injustice in conceding to a railroad company the right to impose such a charge. Where the character of the goods is such that the duty of unloading them would ordinarily devolve upon the railroad company, it may remove them from the car

Midvale Steel Co., 201 Penn. St. 624, 51 Atl. Rep. 313, 88 Am. St. Rep. 836; *Swan v. The Railroad*, 106 Tenn. 229, 61 S. W. Rep. 57; *Railway Co. v. Lockwood*, — Ala. —, 37 So. Rep. 667, 68 L. R. A. 227; *Railroad Co. v. George & Co.*, 82 Miss. 710, 35 So. Rep. 193; *Railroad Co. v. Searles*, 83 Miss. 721, 37 So. Rep. 939, 68 L. R. A. 715; *McGee v. The Railway*, 71 Mo. App. 310; *Darlington v. The Railway*, 99 Mo. App. 1, 72 S. W. Rep. 122; *Owen v. The Railway*, 83 Mo. 464; *Railway Co. v. Propst Lumber Co.*, 114 Ill. App. 659; *Galveston, etc., Ry. Co. v. Hunt* (Tex. Civ. App.), 32 S. W. Rep. 549. But see *Railway Co. v. Holden*, 73 Ill. App. 582, and *Railway Co. v. Lamm*, 73 Ill. App. 592, where a contrary rule as to shipments in car-load lots is laid down.

The term "demurrage," as used in its technical sense, applies to the maritime law and has been held by some authorities to be confined to carriers by water. But the word as used by railroad companies is not used in its technical sense, but is adopted as a convenient term to represent the storage of goods in cars as distinguished from their storage in warehouse. *Dixon v. The Railway*, 110 Ga. 173, 35 S. E. Rep. 369.

A rule charging consignees \$1.00 per day for each car detained after 72 hours from time of arrival, held, reasonable. *Railroad Co. v.*

Adams, 90 Va. 393, 18 S. E. Rep. 673, 44 Am. St. Rep. 916, 22 L. R. A. 530.

A rule providing that a party to whom freight is consigned must receive the same within 48 hours after notice is reasonable, and the railroad company may legally charge storage or demurrage for the use of its cars if the goods are not removed from them within such time. *Railway Co. v. Lockwood*, — Ala. —, 37 So. Rep. 667.

A rate is not necessarily unreasonable because it is the same for cars of different sizes and capacity, nor because a fraction of a day is charged for as a whole day, nor because the customary rate of storage in warehouse or elevator is much lower. *Miller v. The Railroad*, 88 Ga. 563, 15 S. E. Rep. 316, 30 Am. St. Rep. 170, 18 L. R. A. 323.

Whether a rule providing for a certain charge per day on cars not unloaded or loaded within a stated time after being placed is reasonable, is a question of fact for the jury. *Kentucky Wagon Mfg. Co. v. Railway Co.*, 98 Ky. 152, 32 S. W. Rep. 595, 56 Am. St. Rep. 326, 36 L. R. A. 850.

The consignee must have a reasonable time, after having knowledge of the arrival of the freight, to remove it from the cars. But while many circumstances might arise which would have to be taken into consideration in determin-

and place them in its depot or warehouse, and after its liability as a carrier has ceased, it will hold them as a warehouseman in which capacity it will be entitled to demand storage charges. On the same principle the railroad company should be entitled to demand a reasonable compensation in the nature of demurrage where the goods, instead of being held in its warehouse, are allowed to remain upon its cars. But aside from this reason, railroad companies own and control the highways upon which the commerce of the country is largely dependent. The law compels them to receive the goods of the public and to transport and deliver such goods within a reasonable time. To properly perform this function, it is of the utmost importance that their means of transportation should be under their control and that, after the transportation has been completed, their vehicles should not be converted into storehouses at the will of consignees.²¹ In view of this, the law recognizes the right of railroad companies to impose reasonable charges in the nature of demurrage upon consignees whose duty it is to unload their goods from the cars, but who neglect to do so within a reasonable time.

Sec. 860. Same subject—Effect of provision for demurrage charge in railroad company's receipt—Rules and regulations.

ing what a reasonable time would be, the distance which the freight has to be hauled after its removal from the cars is not a circumstance to be considered. *Schumacher v. The Railway*, 207 Ill. 199, 69 N. E. Rep. 825.

Where the time fixed for the consignee to unload the cars has expired, excuses, such as that he was prevented by the weather, will not avail him as against the carrier's right to demand demurrage charges. *Darlington v. The Railway*, 99 Mo. App. 1, 72 S. W. Rep. 122.

If no actual tender of delivery be made by a connecting carrier

to a succeeding carrier because such succeeding carrier states that it will not receive the car, the connecting carrier cannot claim demurrage during the time he is holding the car. *Grand Rapids, etc., R. Co. v. Diether*, 10 Ind. App. 206, 37 N. E. Rep. 39, 1069, 53 Am. St. Rep. 385.

21. In *Norfolk, etc., R. Co. v. Adams*, 90 Va. 393, 18 S. E. Rep. 673, 44 Am. St. Rep. 916, 22 L. R. A. 530, the court said: "Under the abuses that prevailed previous to the establishment of this rule [providing for demurrage charges] serious losses and inconvenience were caused both to the shipping

—If the customer of a railroad company, on the delivery of goods for transportation, accepts a receipt in which it is provided that where the cars are not unloaded within a certain time demurrage will be charged, and the sum named and time

public and the railroad company by the unreasonable and protracted delay of consignees in unloading the cars; the railroad company being unable to furnish cars when called upon by shippers of freight, and their side tracks being incumbered, and the movement of freight impeded, causing heavy expense and a demand for more track room to accommodate idle cars standing unloaded upon the tracks, and the company being unable, therefore, when called upon to furnish cars for the shipping public. The railroad company, as a common carrier, is bound to furnish cars for the transportation of freight; and it must have control over its cars in order to perform its duty to the public. After such reasonable time, the company by the rule becomes simply a bailee for hire, and may make reasonable rules and regulations, and charge for such service as bailee."

In *Miller v. The Railroad*, 88 Ga. 563, 15 S. E. Rep. 316, 30 Am. St. Rep. 170, 18 L. R. A. 323, Simmons, J., said: "The law compels the carrier to receive the goods of the public and to transport and deliver them within a reasonable time. . . . To do this it is necessary that the means of transportation shall be under the carrier's control, and that, after the duty of carriage has been performed, its vehicles shall not be converted into storehouses at

the will of consignees, to remain such indefinitely and without compensation. If no check could be placed upon such detention, it is plain that the business of transportation would be at the mercy of private interest or caprice, and that carriers, thus hampered and unable to foresee the time or extent to which their vehicles would be diverted from the work of carriage, could not provide properly for the demands of traffic, or perform with dispatch their legitimate functions. It would place upon the carrier the burden and expense of supplying numerous vehicles not needed for the hauling of freight, thus requiring it to provide extra facilities as well as to render extra service without compensation beyond that received for transportation. It would result in the accumulation of cars on the carrier's tracks, and the obstruction in a greater or less degree of the movement and unloading of trains. Not only would loss ensue to the carrier, but consignees and shippers in general and the people at large must suffer seriously from this hinderance to the due and regular course of transportation. In this matter the public have rights paramount to those of any individual or class of individuals, and the business of the common carrier must be so conducted as to subserve the general interest and convenience. Especially is this

stated are reasonable, his acceptance will be held to create a binding contract between the parties.¹ And since the right is universally conceded to railroad companies to adopt reasonable rules and regulations for the better management and operation of their roads, and shipments which are made subsequent to their adoption will be held to have been made subject to them, a shipment which is made after a rule has been adopted providing for demurrage charges will be subject to its reasonable provisions, and the customer will be bound by the rule, although no notice of it was inserted in the receipt or bill of lading delivered to him.²

Sec. 861. Same subject—Car service associations.—On account of the great growth of commerce during recent years and the consequent increase in bulk of through freight requiring the cars of one company to be transported over the lines of other companies, it became a matter of some difficulty for railroad companies to keep a proper record of the whereabouts of their cars. To correct this evil and to secure a prompt return of cars after the arrival of the goods at their destination, it has become common for railroad companies operating within

true as to railroad companies in view of the important franchises granted them by the public, and the use and control thus acquired of highways upon which the commerce of the country so largely depends."

1. *Railroad Co. v. Searles*, 83 Miss. 721, 37 S. W. Rep. 939, 68 L. R. A. 715; *Railroad Co. v. Midvale Steel Co.*, 201 Penn. St. 624, 51 Atl. Rep. 313, 88 Am. St. Rep. 836; *Swan v. The Railroad*, 106 Tenn. 229, 61 S. W. Rep. 57; *McGee v. The Railway*, 71 Mo. App. 310; *Galveston, etc., R'y Co. v. Hunt* (Tex. Civ. App.), 32 S. W. Rep. 549.

2. As between the carrier and customers who have notice of a

regulation providing for demurrage, the regulation will be operative whether indicated upon bills of lading or not. *Miller v. The Railroad Co.*, 88 Ga. 563, 15 S. E. Rep. 316, 30 Am. St. Rep. 170, 18 L. R. A. 323.

The right to demurrage for detention of cars exists independent of any express contract giving it. *Darlington v. The Railway*, 99 Mo. App. 1, 72 S. W. Rep. 122.

A rule promulgated by a railroad company imposing demurrage charges for the dilatory unloading of cars will be binding upon consignees though they have no knowledge of such rule. *Railroad Co. v. Searles*, *supra*.

a certain territory to form what are known as car-service associations. The object of these associations is to keep a record of the whereabouts of the cars of the various railroad companies of which the association is composed, and to promulgate and enforce rules and regulations to prevent cars standing idle at one place when needed to meet the traffic demands of another. Such associations are recognized as being lawful, and their rules and regulations, when reasonable, will be upheld.³

To effect the purposes for which car-service associations are organized, their rules uniformly provide that cars shall be unloaded within a certain time and that, after the expiration of such time, a stated charge, spoken of as demurrage, will be collected; and when a rule thus promulgated by the association is reasonable, shipments made over the roads adopting it will be subject to its provisions, and for any detention of cars beyond the time provided for unloading, the stated charge may be collected.⁴

Sec. 862. Same subject—Lien of railroad company on goods to secure payment of charges in the nature of demurrage.—

3. *Railroad Co. v. George & Co.*, 82 Miss. 710, 35 So. Rep. 193. In *Railroad Co. v. Searles*, 83 Miss. 721, 37 So. Rep. 939, 68 L. R. A., 715, it is held that car service associations are not condemned by the Mississippi anti-trust law nor inimical to the public welfare; that they do not infringe upon the rights of the individual nor the well-being of the state, and that they do not constitute an abandonment of corporate autonomy or involve a delegation of corporate functions. It is also said that such an association is not rendered unlawful because some of its members attempt to put it to an unlawful use.

Car service associations, organized for the purpose of promulgating rules and regulations calcu-

lated to secure the prompt unloading of cars, are not unlawful because their rules establish a uniform charge for the detention of cars. Such charge is not intended for revenue, and therefore the rule is not against the law as being an agreement between rival railroad companies not to compete with each other. *Kentucky Wagon Mfg. Co. v. The Railroad*, 98 Ky. 152, 32 S. W. Rep. 595, 56 Am. St. Rep. 326, 36 L. R. A. 850.

4. See cases cited in § 859.

A particular common carrier, though a corporation, makes a regulation its own by adopting it and acting upon it, irrespective of the source from which it is derived. The fact, therefore, that it is promulgated by a person or

While the rule is adhered to by some courts that, in the absence of statute or an express contract on the subject, a railroad company is not entitled to a lien on the goods in its custody to secure the payment of charges in the nature of demurrage which have accrued by reason of the consignee's failure to unload the goods from the cars within a reasonable time after their arrival at destination,⁵ the weight of modern authority sustains the view that, where it is the duty of the consignee, either by general custom or a contract to that effect, to unload the goods, and he fails to do so within a reasonable time after their arrival, the railroad company, on the same principle that it would be entitled to demand storage charges for the use of its warehouse and to claim a lien on the goods to secure the payment of such charges, will be entitled under the law to demand a reasonable charge for the use of its cars and to retain possession of the goods until such charges are paid.⁶ So if a

board of persons representing a combination of such carriers will make no difference. *Miller v. The Railroad*, 88 Ga. 563, 15 S. E. Rep. 316, 30 Am. St. Rep. 170, 18 L. R. A. 323.

5. *Nicollette, etc., Co. v. Pennsylvania Co.*, — Penn. St. —, 62 Atl. Rep. 1060; *Crommelin v. Railroad*, 4 Keyes (N. Y.), 90; *East Tennessee R. Co. v. Hunt*, 15 Lea, 261.

6. *Schumacher v. The Railway*, 207 Ill. 199, 69 N. E. Rep. 825; *Kentucky Wagon Mfg. Co. v. The Railway*, 98 Ky. 152, 32 S. W. Rep. 595, 56 Am. St. Rep. 326, 36 L. R. A. 850; *Railway Co. v. Lockwood*, — Ala. —, 37 So. Rep. 667; *Railroad Co. v. George & Co.*, 82 Miss. 710, 35 So. Rep. 193; *Railroad Co. v. Searles*, 83 Miss. 721, 68 L. R. A. 715, 37 So. Rep. 939; *Railway Co. v. Propst Lumber Co.*, 114 Ill. App. 659.

It is not necessary to the exist-

ence of a lien to secure demurrage charges that have accrued by reason of the detention of cars, that it arise from a specific contract providing for it. Such right may arise by implication, as in the case of a railroad company that has stored goods transported by it when not received by the consignee promptly at the place of delivery. *Schumacher v. The Railway*, *supra*.

A rule of a car service association which provides that when consignees refuse to pay or unreasonably defer settlement of car service charges, cars will not be switched to the private sidings of such consignees, is legal and enforceable. *Railroad Co. v. Searles*, *supra*.

In *Railway Co. v. Lockwood*, *supra*, the railroad company placed a car-load of lumber upon one of its team tracks for the purpose of being unloaded by the

delivery of part of the goods has been made before the time for unloading has expired, the railroad company will be entitled to retain possession of the remainder to secure the payment of charges in the nature of demurrage which have accrued subsequent to such time.⁷ And it has been held that where a portion of the goods contained in several cars, upon which charges for a detention have accrued, is delivered without payment of the charges having been made, the railroad company will be entitled to a lien upon the balance of the shipment to secure the payment of such charges.⁸

Sec. 863. (§ 475.) Carrier's right of action for indemnity—Freight for goods not delivered—Failure to supply cargo.—If the carrier incur any loss from having what are known as dangerous goods imposed upon him without his knowledge, or suffer any loss or penalty from being engaged in the transportation or delivery of illegal goods of the character of which he is not aware, the owner or shipper will be bound to indemnify him.⁹ And if he is prevented from delivering the goods by their being seized through the fault or misconduct of the freighter or owner, he will be entitled to his freight as though

consignee. After the car had remained upon the team track for the period which by the rules of the Alabama car service association was allowed for unloading, only a part of the lumber had been unloaded. Demurrage having accrued, and the consignee having refused to pay the same, the railroad company sealed the car and placed it beyond the consignee's control. The consignee brought suit in trover against the railroad company, and in deciding the case in the supreme court, it was said in part: "The delivery was qualified and conditional upon the lumber being unloaded from the car within a fixed time. The right of the consignee's possession of the lumber, by a delivery of the car upon the team track of the carrier for the purpose of being unloaded by the consignee, was accompanied with the duty on his part to remove the same from the car. The placing of the car, therefore, on the company's team track for the aforesaid purpose was not such an absolute delivery as to destroy the carrier's right of lien for demurrage subsequently accruing." See also, *Darlington v. The Railway*, 99 Mo. App. 1, 72 S. W. Rep. 122.

7. *Railway Co. v. Lockwood*, *supra*.

8. *Railroad Co. v. George & Co.*, *supra*.

9. *Ante*, § 798.

he had actually delivered them.¹⁰ So if he has delivered the goods to the wrong person, and has been obliged in consequence to pay the true owner for them, he may sue the person to whom he delivered them for their value.¹¹ So if a party contracts with the carrier to supply him freight or a cargo for his voyage, and fails to do so, an action will lie on behalf of the carrier, and he may recover the loss which he has sustained by the failure to perform the contract.¹² But he would be bound, in case of such failure, to use due diligence to procure other goods to complete his cargo. He will have no right to remain idle, if other freight can be procured, and to claim freight for the goods which were not carried because not delivered to him under the contract.¹³

III. THE CARRIER'S RIGHT OF LIEN.

Sec. 864. (§ 476.) The carrier has a lien for his freight.—As security for his compensation for the carriage of the goods, and for the advances which he has been required to make for the owner in order to further their transportation, the carrier has what is called a lien upon them, which is nothing more than a right to retain possession of them until such charges have been paid or tendered, and differs in no important respect from the right which the law gives to other bailees of chattels who have performed labor or expended their means upon them at the request of the owner. The owner of the goods has no right to demand their possession until he has paid or tendered payment for the service and advances, nor, as a general rule, has the carrier a right to the payment of his freight until the goods are tendered to the party to whom they are consigned.¹⁴

10. *Bradstreet v. Baldwin*, 11 Mass. 229. 421; *Cockburn v. Alexander*, 6 C. B. 791; *Harries v. Edmonds*, 1 C.

11. *Brown v. Hodgson*, 4 Taunt. & K. 686. 13. *Hamilton v. McPherson*, 28 N. Y. 72.

12. *Bixby v. Bennett*, 3 Daly, 470; *Barker v. Havens*, 17 Johns. 225; *Hunter v. Fry*, 2 B. & Ald.

Sec. 865. (§ 477.) Lien usually a specific one—When general.—This lien of the carrier is only a specific or particular lien in being confined to charges and advances upon the particular goods upon which it is claimed,¹⁵ as distinguished from what

234; *Bowman v. Hilton*, 11 Ohio, 303; *Fuller v. Bradley*, 25 Penn. St. 120; *Skinner v. Upshaw*, 2 Ld. Raym. 752; *Wilson v. Railroad*, 56 Me. 60; *Lickbarrow v. Mason*, 2 T. R. 63.

In *McCullough v. Hellweg*, 66 Md. 269, it is said that the lien does not attach until the contract to safely deliver has been so far performed that the carrier is in a situation to demand the freight. See, to like effect, *Johnston v. Davis*, 60 Mich. 56.

Carriers by water have a lien for their charges the same as carriers by land and, aside from the manner of its enforcement which is by statute devolved upon courts of admiralty, it rests upon the same principles as the common-law lien of carriers by land. *Warehouse & Builders' Supply Co. v. Galvin*, 96 Wis. 523, 71 N. W. Rep. 804, 65 Am. St. Rep. 57, citing *Hutch. on Carr.*

A carrier by water has an undoubted right to retain the goods until the charges for freight are paid, but he cannot detain the goods for such purpose on board the ship, as the consignee or owner of the cargo would then have no opportunity of examining its condition. *Mordecai v. Lindsey*, 79 U. S. 417, 18 L. Ed. 486.

"As between the respective owners of a ship and cargo, their rights are reciprocal. The right to a lien for freight gives a right to a lien upon the ship for due

performance of the contract for safe carriage and delivery, and no such lien upon the ship attaches until the lien for freight has attached upon the cargo." *The Bella*, 91 Fed. 540. See also, *Warehouse & Builders' Supply Co. v. Galvin*, 96 Wis. 523, 71 N. W. Rep. 804, 65 Am. St. Rep. 57, citing *Hutch. on Carr.*

15. *Bacharach v. Chester Freight Line*, 133 Penn. St. 414, 19 Atl. Rep. 409; *Pennsylvania R. Co. v. Oil Works*, 126 Penn. St. 485; *Atlas S. S. Co. v. Colombian Land Co.*, 102 Fed. 358, 42 C. C. A. 398.

The better opinion would seem to be that the lien attaches to the goods as soon as they are delivered to the carrier. They cannot be demanded of him by the owner after such delivery without a tender of the whole freight which the carrier would earn by carrying them to destination, and giving him an indemnity, if it be required, against the consequences of any outstanding bill of lading which he may have given for the goods. And although the carriage may not have actually commenced, the carrier, by the delivery, has assumed the risk of the safety of the goods as a *quasi-insurer*. *Tindall v. Taylor*, 4 El. & B. 219; *Thompson v. Small*, 1 Com. B. 328, 354; *Thompson v. Trail*, 2 C. & P. 334; *Bartlett v. Carnley*, 6 Duer, 194; *Van Buskirk v. Purinton*, 2 Hall, 561; *Collman v. Collins*, *id.* 569.

is known as a general lien, by which the bailee has the right to retain his possession until any balance which the owner may owe him on other accounts than the expenses and services upon the particular goods has been paid. Thus limited, the lien of the carrier is favored by the courts, and the presumption will always be in favor of its existence until it is shown to have been waived by the stipulations or conduct of the parties, incompatible with the existence of such a right, or to have been lost by the voluntary acts of the carrier. But general liens in behalf of carriers, as well as of other bailees, are regarded with jealousy, it is said, as being encroachments upon the common law.¹⁶ And whilst carriers may, by express agreement or by the long established and well known usage of particular localities, or of particular classes of those engaged in that business, become entitled to retain the goods which may come into their custody for such general balances, they cannot acquire such right by notice to their employers, though it has been held that ordinary tradesmen or artisans, who may work for whom they please, may, in this manner, acquire the right to retain for all that the owners of the goods intrusted to them may owe. But it was said that the same rule did not apply to carriers and inn-

Other cases state the law as being that no right to freight accrues or can attach to the goods until the voyage has commenced, or, as it is usually expressed, until the ship has broken ground. *Bailey v. Damon*, 3 Gray, 92; *Curling v. Long*, 1 B. & P. 634; *Clemson v. Davidson*, 5 Binney, 392; *Burgess v. Gun*, 3 Har. & J. 225.

But it has been suggested that the rule adopted by these latter cases is appropriate only in cases of ships chartered at a freight payable according to time, and not to general ships or to other carriers.

East, 224; *McFarland v. Wheeler*, 26 Wend. 467.

But where the same vendor, under a single contract of sale, ships several consignments of goods to the same vendee, each shipment embracing several car-loads, the carrier has the right to retain out of any one or more of the consignments enough of the goods in value sufficient to pay the charges for freight without respect to the particular consignments out of which the goods are retained. *Penn. Steel Co. v. Railroad Co.*, 94 Ga. 636, 21 S. E. Rep. 577. See also, cases cited in following section.

16. *Rushforth v. Hadfield*, 7

keepers, who have no right to say that they will not receive goods except on their own terms.¹⁷

Sec. 866. What charges the lien protects.—The lien allowed to the carrier by law to secure the payment of freight extends only to his charges for the transportation of the goods.¹⁸ It includes legal import duties paid by him either to the government directly or to a connecting carrier who has already paid such charges;¹⁹ it also includes salvage charges.²⁰ It does not include, however, expenses for warehousing the goods,²¹ nor damages for the breach of collateral contracts or covenants by the shipper, even when incorporated in the bill of lading.²² And in England it has been held not to include the payment of port charges.²³

Sec. 867. (§ 478a.) Same subject—Lien of last of connecting carriers for freight advanced to preceding carrier.—But the

17. *Kirkman v. Shawcross*, 6 T. R. 14; *Wright v. Snell*, 5 B. & Ald. 350.

18. The lien will extend to expenses necessarily incurred in reconditioning insufficient bags according to the terms of the bill of lading. *Payne v. Ralli*, 74 Fed. 563. The lien extends only to charges connected with the transportation. *Berry, etc., Co. v. Railway Co.*, — Mo. App. —, 92 S. W. Rep. 714.

Carrier cannot seize or hold goods for debts due himself not connected with the carriage. *Pharr v. Collins*, 35 La. Ann. 939. Where goods are consigned generally to consignee, the carrier cannot hold them for general freight balance against consignor, even though bill of lading so provides. *Bacharach v. Freight Line*, 133 Penn. St. 414, 19 Atl. Rep. 409; *Atlas S. S. Co. v. Colombian Land Co.*, 102 Fed. 358, 42 C. C. A. 398.

19. *Railroad Co. v. Pearce*, 192 U. S. 179, 48 L. Ed. 397, reversing *Pearce v. Railroad Co.*, 89 Mo. App. 437; *Waldron v. Railway Co.*, 22 Wash. 253, 60 Pac. Rep. 653.

20. *Chicago, etc., Co. v. Packet Co.*, 38 Iowa, 377.

21. *Lambert v. Robinson*, 1 Esp. 119; *Steamboat Virginia v. Kraft*, 25 Mo. 76; *Winchester v. Busby (Can.)*, 16 S. C. R. 336.

22. *Phillips v. Rodie*, 15 East, 547; *Burley v. Gladstone*, 3 M. & S. 205; *Gray v. Carr*, L. R. 6 Q. B. 522.

A carrier cannot refuse to deliver until payment of charges for a former shipment is made. *Atchison, etc., Ry. Co. v. Bourdett*, — Kan. —, 85 Pac. Rep. 820. But see, *Penn. Steel Co. v. Railroad Co.*, 94 Ga. 636, 21 S. E. Rep. 577, cited in notes to preceding section.

23. *Faith v. The E. Ind. Co.*, 4 B. & Ald. 630.

lien will extend to and embrace advances made to preceding carriers, for their charges for the portion of the transportation performed by them; and the ultimate or final carrier may refuse to deliver the goods until his own charges and all such advances have been paid,²⁴ unless the bill of lading shows, or the carrier is otherwise informed, that such preceding carriers

24. *Briggs v. The Railroad*, 6 Allen, 246; *White v. Vann*, 6 Humph. 70; *Wells v. Thomas*, 27 Mo. 17; *Galena, etc., R. R. v. Rae*, 18 Ill. 488; *S. B. Virginia v. Kraft*, *supra*; *Express Co. v. U. S. Express Co.*, 88 Fed. 659; *affirmed*, 92 Fed. 1022, 35 C. C. A. 172; *Cayo v. Pool's Assignee*, 108 Ky. 124, 55 S. W. Rep. 887, 49 L. R. A. 251, 94 Am. St. Rep. 348; *Thomas v. Railway Co.*, 25 Ky. L. Rep. 1051, 76 S. W. Rep. 1093; *Hoffman v. Railway Co.*, 125 Mich. 201, 84 N. W. Rep. 55; *Evans & Hollinger v. Railroad Co.*, 76 Mo. App. 472.

The final carrier will have a lien for charges advanced, and it is not required to go to the trouble and expense of investigating the merits of prior charges which are apparently just. *Berry, etc., Co. v. Railway Co.*, — Mo. App. —, 92 S. W. Rep. 714.

The last carrier may pay the charges of previous carriers and hold the goods for his reimbursement as well as for his own share of the freight earned, and these charges, if within the ordinary rates and apparently regular, are not to be cut down nor the right to hold the goods defeated by the mistake or omission of a previous independent carrier, of which the last carrier, without fault or negligence on his part, has no notice. The fact that goods were shipped

"released" or prepaid does not affect the question if last carrier had no notice of it. *Georgia R. Co. v. Murray*, 85 Ga. 343, 11 S. E. Rep. 779; *Bird v. Railroad Co.*, 72 Ga. 655; *Knight v. Railroad Co.*, 13 R. I. 572; *Wolf v. Hough*, 22 Kans. 659; *Express Co. v. Shoop*, 85 Penn. St. 325; *Crossan v. Railroad Co.*, 149 Mass. 196; *Schneider v. Evans*, 25 Wis. 241; *Railroad Co. v. Brookhaven*, 71 Miss. 663, 16 So. Rep. 252.

"It is the well settled law that every carrier, through whose hands goods are shipped, becomes the agent of the owner and has implied authority from him as such agent to advance previous charges upon them and collect them again from the next carrier or warehouseman into whose hands he delivers them. While this is so, the carrier is bound to act in good faith toward, and to carefully watch the interest of the owner, whoever he may be. He is bound to do this to the same extent that a prudent man would were he present acting for himself. He must see that the previous charges are reasonable before he is authorized to pay them, for it is not every charge which every extortioner through whose hands goods pass *in transitu* may see fit to impose upon them that he is authorized to pay and thus fix upon the owner a certain lia-

have been prepaid.²⁵ And to ascertain this fact he must examine the bill of lading if one accompanies the goods. But if it be silent on the subject, and the carrier has no information from any other source of the prepayment, he is justified in advancing the freight, and will be entitled to a lien therefor.²⁶ If the carrier who contracts to carry the goods employ another carrier to carry them, the latter will be entitled to a lien,²⁷ unless the first carrier has been paid for the service,²⁸ or unless such first

bility." *Armstrong v. Railway Co.*, 62 Mo. App. 639, 1 Mo. App. Rep'r 552.

In *Railway Co. v. Stoner*, 5 Tex. Civ. App. 50, 23 S. W. Rep. 1020, the court held that, where goods are tendered to a carrier by a connecting line, such carrier need not delay receiving them until the original contract with the owner can be investigated. Such carrier is required by statute in Texas to receive the goods when properly tendered, and if he has no knowledge of a previous contract as to the freight, and no special contract is made as to compensation, he has the right to charge his reasonable and customary rates for like service.

Although a connecting carrier may refuse to deliver goods until all advances have been paid, he is not liable to the preceding carriers for their freight charges and advances if the goods are destroyed on his wharf preparatory to delivery to him. *Railroad Co. v. National S. S. Co.*, 137 N. Y. 23, 32 N. E. Rep. 993, *affirming* 62 Hun, 621, 17 N. Y. Supp. 28; s. c. 14 N. Y. Supp. 253.

25. *Marsh v. Railway Co.*, 3 McCrary, 236; *Converse Bridge Co. v. Collins*, 119 Ala. 534, 24 So. Rep. 561.

26. *Travis v. Thompson*, 37 Barb. 236.

Where goods were shipped under a through bill of lading over the lines of several connecting carriers, and the last of such carriers accepted the goods from the next preceding carrier with notice that the initial carrier had issued to the consignor such through bill of lading which recited that the entire freight charges had been paid, which statement was erroneous and known to the last carrier to be such, and with such information the last carrier paid the freight charges which had accrued up to the time it took possession of the consignment, he did so, in so far as a *bona fide* transferee of the bill of lading was concerned, at his own risk, and could not, as to such holder who had taken the bill of lading under the belief that the freight charges had been prepaid, withhold the goods to secure the payment of the freight charges so advanced. *American National Bank v. Railroad Co.*, 96 Ga. 665, 23 S. E. Rep. 898, 51 Am. St. Rep. 155.

27. *Nordemeyer v. Loescher*, 1 Hilt. 499.

28. *Matthews v. Gibbs*, 3 El. & El. 282.

carrier had no authority, either express or implied, to forward the goods beyond his own line.²⁹ Nor will the lien of the last carrier be affected by the fact that the previous carrier has been in default by reason of damage to the goods.³⁰ And if the goods are carried to the wrong destination, or over a wrong route, by the fault of the shipper or his agent, the carrier will nevertheless be entitled to his freight.³¹

29. *Siefert v. Railway Co.* (Tex. Civ. App.), 57 S. W. Rep. 899. and carried it to its destination.

30. *Thomas v. Railway Co.*, 25 Ky. L. Rep. 1051, 76 S. W. Rep. 1093. The plaintiff tendered the usual charge between Chicago and Bloomfield and demanded the package. The terminal carrier refused to deliver it until the greater charge was paid, claiming a lien thereon for its own and the preceding charges which it had advanced. The plaintiff sued the last carrier in replevin and on the trial judgment was entered for the defendant. In affirming the judgment the appellate court said: "The law is that where the shipper delivers goods to a carrier to be carried over successive routes beyond the route of the first carrier, he thereby makes the first carrier and each succeeding carrier his forwarding agent for the purpose of making delivery of the goods to the next carrier (citing *Hutch. on Carr.*) and the act of the first or any succeeding carrier in directing the shipment of the goods over succeeding routes will be deemed the act of the owner. While so acting, if a mistake is made in directing the goods, such mistake will in no manner affect the last carrier's right of lien for its own or prior charges advanced, so long as such last carrier acts in good faith in advancing the charges. It is not the custom, nor does the law require of such

31. *Briggs v. The Railroad Co.*, 6 Allen, 246; *Fordyce v. Johnson*, 56 Ark. 430, 19 S. W. Rep. 1050; *Crossan v. Railway Co.*, 149 Mass. 196, 21 N. E. Rep. 367.

In *Glover v. Railroad Co.*, 95 Mo. App. 369, 69 S. W. Rep. 599, the plaintiff delivered a package containing a set of single harness to the Adams Express Co., at Chicago, Ill., to be delivered to him at Bloomfield, Mo. It was necessary, in order to reach Bloomfield, that the package should pass over several connecting lines. No route was agreed upon between the initial carrier and the shipper. The Adams Express Company, instead of tendering the package to a connecting carrier in the most direct line of route, delivered it to another company which necessitated that it pass over a longer route in order to reach destination. A greater charge was thereby incurred than if the package had been carried by the usual and more direct route. It was conceded that the initial carrier had misrouted the package. On the receipt of the package by the last carrier, it advanced the accumulated charges

Where an initial carrier has no contract with a connecting carrier authorizing such initial carrier to contract for a lower rate than his regular rate for through shipments, but the initial carrier nevertheless guarantees a lower through rate to the shipper than the regular rate, and the last connecting carrier receives and carries the goods without knowledge of such guaranteed rate and advances prior charges, the last carrier will have a lien not only for the charges advanced but for his own charges.³² But where the last carrier does not advance to the initial or prior connecting carrier the accrued charges, and the consignee tenders the contract price which is in excess of the sum due the last carrier, a different case is presented. Not having advanced the charges to the preceding carrier, the last carrier would manifestly be acting as the agent of the initial carrier and his right to retain the goods would rest upon the validity of the charge agreed to by the initial carrier and would be limited by such charge. The last carrier, under such circumstances, would be entitled to retain the goods for a reasonable time within which to learn the facts, and after he had so done or had had a reasonable time to do so, he could no longer rightfully retain the goods. He would have the right to retain his own charges out of the amount paid, and when the

carrier when the goods are offered to him for transportation, to delay the reception or forwarding of the goods until he can ascertain whether or not the shipper and the initial carrier stipulated the terms of shipment, and if so, what those terms were, and whether or not all the preceding carriers have fulfilled them; or if no terms were stipulated, then whether or not the initial carrier has in all things faithfully and honestly discharged his duty as the implied agent of the shipper in forwarding the goods. It is enough to protect his lien for such charges that, in accepting the goods to be carried to destination, he acts in good faith, and in the usual course of business; and when he does so, mistakes or errors made by the first carrier or any intermediate carrier in giving directions for the forwarding of the goods will not affect his right of lien.

32. *Lowenberg v. Railway Co.*, 56 Ark. 439, 19 S. W. Rep. 1051; *Miller v. Railroad Co.*, 83 Tex. 518, 18 S. W. Rep. 954; *Moses v. Railroad Co.*, 5 Wash. 595, 32 Pac. Rep. 488.

balance was returned to the initial carrier he would have complied with his duty to such carrier.³³

Sec. 868. Lien on sub-freight.—A lien on sub-freight given to a shipowner by a charter party can only be exercised before the amount due thereon has been paid to the charterer of the ship or his agent. The law confers no right on the shipowner to follow the sub-freight after the charges thereon have been paid.³⁴

Sec. 869. (§ 479.) Lien lost by unconditional surrender of goods—Waiver by conduct.—The lien of the carrier being nothing more than a right to withhold the goods, and being inseparably associated with their possession, and dependent upon such possession, it follows that it will cease whenever they are unconditionally delivered,³⁵ and the fact that the consignee is an agent of the consignor, and agrees to hold the goods until the charges are paid, cannot alter the rule if the carrier has made a delivery to such consignee.³⁶ But if it appears that it was agreed or understood between the parties that, notwithstanding the delivery, the carrier was to be considered as reserving the right to proceed against the goods for his freight, on the failure of the consignee or owner to pay it, or if such an understanding is plainly to be inferred from the local usage of the particular port, he will be treated as still constructively retaining the possession of the goods so far as to preserve his lien.³⁷ But the mere intention of the carrier not to abandon

33. *Railroad Co. v. Brookhaven Match Co.*, 71 Miss. 663, 16 So. Rep. 252.

34. *Tagart, Beaton & Co. v. Fisher & Sons*, 1 K. B. (1903) 391, 72 L. J. K. B. 202.

35. *Bigelow v. Heaton*, 4 Denio, 496; *Sears v. Wills*, 4 Allen, 212; *Bailey v. Quint*, 22 Vt. 474; *Forth v. Simpson*, 13 Q. B. 689; *Reine-man v. Railroad Co.*, 51 Iowa, 338; *Geneva, etc., R. Co. v. Sage*, 35 Hun, 95; *Gregg v. Railroad*, 147 Ill. 550, 35 N. E. Rep. 343, 37 Am. St. Rep. 238.

36. *Lembeck v. Jarvis, etc., Co.*, — N. J. L. —, 63 Atl. Rep. 257.

37. *Bags of Linseed*, 1 Black, 108; *The Eddy*, 5 Wall. 481; *Cuff v. Tons of Coal*, 46 Fed. 670; *McBrier v. A Cargo of Hard Coal*, 69 Fed. 469.

In *Costello v. Laths*, 44 Fed. Rep. 105, the master of a ship discharged a car-load of laths by the direction of the consignee in the lumber-yard of a purchaser about three hundred feet from the vessel. On completing the discharge,

his lien, notwithstanding the delivery, if uncommunicated to the consignee, and not assented to by him, will not continue the lien after the surrender of the custody of the goods, in the absence of a previous express agreement or some local custom or usage to that effect.³⁸

So the lien will be deemed waived when the carrier bases his refusal to deliver upon other grounds, as that the goods are not in his possession at the place where the demand is made.³⁹

But the rule that the carrier loses his lien by surrendering the goods has been held not to apply to a case where the surrender is made to one to whom the consignee has made an assignment for the benefit of his creditors. The carrier in such case is deemed to be a creditor for whom, with other creditors, the assignee holds the goods in trust after they are delivered to him. The delivery of the property to the assignee, being for the benefit of all creditors, it is held that the lien follows the fund realized on the property delivered, and that the carrier is entitled to be paid out of it the amount ascertained to be due him.⁴⁰

Sec. 870. (§ 480.) Lien not lost by a delivery of part of the goods.—Nor will the delivery of a part of the goods lessen the amount of freight for which the carrier may claim a lien, upon that which he may still hold undelivered. In other words, the whole amount of the freight is a lien upon all and every part of the goods, where they are capable of separation and of being separately delivered; and if a part of them have been delivered, the carrier may retain the balance until his entire freight has been paid, and the owner cannot insist that the lien shall be apportioned according to the quantity still retained by

the master demanded his freight, but payment was refused owing to a dispute as to the amount. The master immediately served notice that his lien was not abandoned and action was brought to enforce it. *Held*, lien was not lost. *Bags of Linseed, supra*; *One Hundred and Fifty-one Tons of Coal,*

4 Blackf. 368, and *Egan v. Laths* were cited and distinguished.

38. *The Tan Bark Case*, 1 Brown, Adm. 151.

39. *Adams Ex. Co. v. Harris*, 120 Ind. 73.

40. *Cayo v. Pool's Assignee*, 108 Ky. 124, 55 S. W. Rep. 887, 49 L. R. A. 251, 94 Am. St. Rep. 348.

the carrier.⁴¹ A partial delivery will not be taken as a constructive delivery of the whole, or as a waiver of the lien, unless such was the intention of the parties.⁴² And where the shipment is large, and cannot be landed in a day, if the carrier lands a part of it, his lien upon the whole gives him the power to ask from the consignee a satisfactory security for the payment of the entire amount, before a delivery of that part. But he cannot demand that the whole freight be paid until the goods have been unladen, and the consignee has been furnished an opportunity to examine them. And it would seem that if the consignee will not furnish the required security, the master will not be required to deliver the goods, or to receive his freight in parcels, but may store the goods as they are unloaded at the consignee's expense, and subject to the ship's lien, until they are all ready for delivery. Nor can the carrier insist upon a delivery of one shipment by parcels, and the payment of the freight by installments as the parcels may be delivered.⁴³

Sec. 871. (§ 481.) Lien not lost by delivery obtained by trick or fraud.—And if the delivery is procured by any trick or fraud of the consignee, or even by his promise to pay the freight as soon as the delivery is made, which he fails to do, the carrier does not lose his lien or his right to the possession of the goods. In *Bigelow v. Heaton*,⁴⁴ the carrier applied to the consignee for his freight before he had delivered the goods, and the

41. *Fuller v. Bradley*, 25 Penn. St. 120; *Lane v. Old Colony R. R.*, Mass. 104.

14 Gray, 143; *New Haven, etc., Co. v. Campbell*, 128 Mass. 104; 527.

Ware River Railroad v. Vibbard, 114 Mass. 447; *Potts v. Railroad Co.*, 131 Mass. 455; *Railroad Co. v. Davis*, 86 Hun, 86, 34 N. Y. Supp. 206; *affirmed*, 158 N. Y. 674, 52 N. E. Rep. 1125.

42. *Boggs v. Martin*, 13 B. Mon. 239. Whether such was the intention is a question of fact. *New*

The law seems to be understood differently by the English courts, and the rule adopted by them is that, where the cargo is delivered in parcels, the carrier may require his freight to be paid upon each parcel as delivered. *Paynter v. James*, L. R. 2 C. P. 348.

44. 6 Hill, 43; s. c. 4 Denio, 496.

consignee promised that if he would deliver them he would pay the freight. The delivery was made, but the consignee then refused to pay unless the carrier would reduce his charges; whereupon the latter retook the goods by a writ of replevin, and it was held that he was entitled to the action and to the repossession of the goods, upon the same ground which entitles the vendor of chattels to recover them from the vendee, when the sale was for cash, and the latter, after delivery to him, refuses to pay the price.⁴⁵

Sec. 872. (§ 482.) Lien takes precedence of claims of consignor or creditors.—The lien takes precedence of the claims of the general creditors of the owner or consignee of the goods, and the plaintiff in an action against him, who seizes or levies upon them, must pay the carrier his freight before he can legally take them from his possession; but the plaintiff or officer who pays the carrier will be substituted to his lien upon the goods.⁴⁶ So the lien of the carrier is *pro tanto* superior to the right of the vendor to his stoppage *in transitu*, and when the latter undertakes to enforce his right to stop the goods on account of the insolvency of his vendee, by taking them from the possession of the carrier, he must first tender to him his freight, and he has no right to their possession until he has done so.⁴⁷

45. 150 Tons of Coal, 4 Blatch. 368; Wallace *v.* Woodgate, Ryan & M. 193; Hays *v.* Riddle, 1 Sandf. 248; Ash *v.* Putnam, 1 Hill, 302; Bristol *v.* Wilsmore, 1 B. & C. 514; Anchor Mill Co. *v.* Railroad Co., 102 Iowa, 262, 71 N. W. Rep. 255.

46. Rucker *v.* Donovan, 13 Kan. 251; Railroad Co. *v.* Bossut, 62 Pac. Rep. 977, 10 N. Mex. 322.

The lien of a carrier and warehouseman for keeping property is superior to that of a pledgee who has procured the property to be transported and stored. Cooley *v.* Railway Co., 53 Minn. 327, 55 N. W. Rep. 141, 39 Am. St. Rep. 609.

A common carrier, who accepts freight for transportation without first securing its charges, stands inferior, with respect to its lien therefor, to a mortgagee of such freight where it appears that the carrier had both constructive and actual knowledge of the mortgage before it accepted the freight for transportation. Owen *v.* Railway Co., 11 S. Dak. 153, 76 N. W. Rep. 302.

47. Pennsylvania R. Co. *v.* Oil Works, 126 Penn. St. 485; Oppenheim *v.* Russell, 3 Bos. & P. 42; Morley *v.* Hay, 3 M. & Ryland, 396; 2 Kent's Com. 541.

And even after a part delivery the carrier may maintain his lien for the whole charges upon the balance undelivered, even as against the vendor's right of stoppage in transit.⁴⁸ But a lien by usage for a general balance due the carrier, while it may be good as between the carrier and the consignee, cannot, it is held, prevail against the vendor's right of stoppage.⁴⁹

Sec. 873. Rights of conditional vendor who authorizes shipment of goods.—When a vendor makes a conditional sale of goods, and authorizes the vendee to ship and use them, the vendor is estopped from disputing the carrier's lien for freight. To say that the giving of such authority does not contemplate or extend to the giving of credit for freight, but only to payments in advance, would be contrary to the universal course of business. The law presumes according to the usual order of things.⁵⁰

Sec. 874. Lien lost where carrier is liable for damages to goods equal to or exceeding the freight charges.—The lien of the carrier being only co-extensive with his right to recover freight, it follows that if through any cause for which the carrier would be liable, the goods are injured to such an extent that the damage equals or exceeds the freight charges, the lien, it is held, will be destroyed; and should the carrier under such circumstances insist on reserving their possession to himself for the purpose of securing his charges, the detention will be unlawful.⁵¹

Sec. 875. (§ 483.) Lien may be waived by terms of payment.—While the law will presume in favor of the continuance of the lien, the right to it may be waived by the carrier without an express agreement to that effect, and such an intention may be inferred from the terms as to the payment of the freight agreed upon between the parties; as where the time agreed upon for the payment is postponed to a future day beyond the time

48. *Potts v. Railroad Co.*, 131 Mass. 455.

49. *Farrell v. Railroad Co.*, 102 N. C. 390.

50. *Lake St. El. R. Co. v. Railroad Co.*, 66 N. Y. Supp. 455, 32 Misc. 669.

51. *Dyer v. Railway Co.*, 42 Vt.

at which the goods are to be delivered, or where such payment is to be made at such time or place as necessarily presupposes that the delivery is to be first made. And it will be considered as waived by implication whenever any provision in the bill of lading or other contract in relation to the affreightment is inconsistent or irreconcilable with the payment of the freight as a condition precedent to the delivery.⁵² But no special agreement as to the carriage and delivery, which does not expressly or by clear implication amount to a waiver of the lien, will have that effect, though it was formerly thought otherwise.⁵³

Sec. 876. (§ 484.) Same subject—Waiver by taking acceptance payable after delivery.—Accordingly, where the contract was for a voyage from Liverpool to San Francisco, and that the freight should be paid, part by the shipper's acceptance at six months from the sailing of the vessel, and the remainder by his acceptance at three months from the date of the delivery of the cargo at destination, it was held that the lien was not waived or displaced as to that portion of the freight covered by the six months' acceptance from the date of the sailing of the vessel, the shipper having become insolvent, and the bill of exchange having been protested before the vessel's arrival at destination, a bill of exchange given for a debt not being a payment or an extinguishment of the debt except by the express agreement of the parties; but it was held that, as to the freight intended to be secured by the bill payable at three months from the date of the delivery, the lien had been waived, and that to that extent the carrier had no interest in the cargo.⁵⁴

Sec. 877. (§ 485.) Same subject—What does not amount to waiver.—But unless the stipulation is that the delivery shall

441; *Miami Powder Co. v. Rail-* stone & N. 705; *Tamvaco v. Simp-*
way Co., 47 S. Car. 324, 25 S. E. son, 19 Com. B. (N. S.) 453, L. R.
Rep. 153, 58 Am. St. Rep. 880. 1 C. P. 363.

52. *Raymond v. Tyson*, 17 How. 53. *Chase v. Westmore*, 5 M. &
53; *Chandler v. Belden*, 18 Johns. S. 180; *Lucas v. Nockells*, 4 Bing.
157; *Schooner Volunteer*, 1 Sumn. 729; *Pinney v. Wells*, 10 Conn.
551; *The Eddy*, 5 Wall. 481; *Al-* 104.
sager v. Dock Company, 14 M. & 54. *The Bird of Paradise*, 5
W. 794; *Foster v. Colby*, 3 Hurl- Wall. 545.

precede the payment of the freight, or the terms of the agreement as applied to the subject-matter and the surrounding circumstances are such as clearly to show that the claim to the lien has been waived or abandoned, the carrier will not be deprived of the security which it is intended to afford him, as the presumption will be in favor of its existence, and will prevail where the terms of the special agreement are not absolutely inconsistent with the retention of the goods.⁵⁵ Accordingly, where the stipulation was that the freight should be paid within ten days after the vessel returned to the port of departure, it was held that the lien was not displaced on the return cargo, as its delivery might be rightfully postponed beyond the ten days after the return of the ship, when by the terms of the contract the freight would become due.⁵⁶

Sec. 878. (§ 486.) Same subject—Other illustrations.—So where the freight was to be paid in five days after the vessel's return to and discharge in the return port of the voyage, it was held that the word discharge, as used by the parties, meant merely the unloading of the cargo from the ship, without any reference to a delivery to the owner or consignee.⁵⁷ And where the agreement was that the freight was to be paid, "one-half in five and one-half in ten days after the discharge of the homeward cargo," and notes were given for the accommodation of the carrier, payable near the time when it was expected the ship would arrive, and which it was agreed were to be held over or renewed in case they fell due before the ship reached home, and shortly before the arrival of the vessel, and before the notes became due, the freighter failed, it was held that there was nothing in this arrangement between the parties so inconsistent with the carrier's retention of the goods after their

55. *Crawshay v. Homfray*, 4 B. Edes, 4 Cow. 470; *Drinkwater v. & Ald.* 50; *Pinney v. Wells*, 10 Brig Spartan, 1 Ware, 145; *How-Conn.* 104; *Wilson v. Kymer*, 1 ard v. Macondray, 7 Gray, 516. M. & S. 157; *Neish v. Graham*, 8 56. *The Volunteer*, 1 Sumn. El. and B. 505; *Campion v. Col-* 551. vin, 3 Bing. N. C. 17; *The Bird* 57. *Certain Logs of Mahogany,* of Paradise, *supra*; *Clarkson v.* 2 Sum. 589.

arrival as to destroy or displace his lien, although the notes by their terms did not fall due until about five weeks after the arrival of the vessel.⁵⁸

Sec. 879. (§ 487.) Same subject—Other illustrations.—And although the carrier may have agreed to extend the time for the payment of the freight beyond that of the delivery, yet if the agreement is that the credit is to be given upon condition that the freighter shall furnish security for its payment, or deliver to the carrier bills or notes for the amount, the lien will attach to the goods, and will not be discharged so that the shipper will be entitled to them until he has given the security or has tendered or offered to deliver the notes or bills to the carrier, according to the agreement. In such cases, the offer of the security, or the payment by bill or note, and the delivery of the goods, are to be concomitant acts which neither party is obliged to perform without the other's being ready to perform the correlative act.⁵⁹

Sec. 880. (§ 488.) Carrier may store goods subject to lien when consignee fails or refuses to pay freight.—If, after the arrival of the goods at their destination, the owner or consignee fail or refuse to pay the freight and accept them within the time provided by the contract of affreightment, or if, in the absence of any stipulation upon the subject, he fail to do so after a reasonable opportunity has been afforded him, the carrier may store the goods by depositing them with a storekeeper or warehouseman, at the expense of the consignee, subject to his lien for freight. When this is done, the warehouseman will hold the goods under the authority of the carrier, and his possession will be regarded as that of the carrier for the purpose of preserving the lien.⁶⁰ The deposit may be made in the name

58. *The Kimball*, 3 Wall. 37. *ber*, 56 N. Y. 544; *The Eddy*, 5

59. Per Gibbs, C. J., in *Tate v. Wall*. 481; *Brittan v. Barnaby*, 21 Meck, 8 Taunt 280; *Tamvaco v. How*. 527; *Alden v. Carver*, 13 Simpson, 19 Com. B. (N. S.) 453; *Iowa*, 253; *Davidson S. S. Co. v. Brown v. Tanner*, L. R. 3 Chan. 119,254 *Bushels of Flaxseed*, 117 597. Fed. 283; *Gregg v. Railroad Co.*,

60. *Western Trans. Co. v. Bar-* 147 Ill. 550, 35 N. E. Rep. 343, 37

of the carrier, and not on account of or for the owner or consignee; and being made in consequence of the default of the latter, it will neither be a conversion of the goods nor a discharge of the lien; and the warehouseman being, under such circumstances, the agent of the carrier, cannot deliver the goods except upon the condition of the payment of the freight; and if he do, it has been held that he will be liable to the carrier for a conversion of them, and for the full amount of his freight.⁶¹

Sec. 881. (§ 488a.) Liability of carrier while so holding goods.—While holding the goods in pursuance of his lien the carrier is not an insurer and is bound to use reasonable care in respect of the goods, but he is not liable if they are lost or injured without fault or neglect on his part.⁶²

Sec. 882. (§ 489.) Whether the carrier has a lien upon goods wrongfully shipped by one who is not the owner.—The question whether the carrier can acquire a lien for his charges, as against the right of the true owner of the property to its possession, upon property which has been intrusted to him by a wrong-doer, who was unlawfully in its possession, and has unlawfully and without authority bailed it to the carrier, has been much mooted. In England it seems to be settled beyond controversy that the lien attaches to the goods under such circumstances in favor of both the carrier and an innkeeper. Many cases have there occurred in regard to the right of the innkeeper to the lien, where goods of which he was unlawfully in possession have been brought by a guest to an inn, and it has been uniformly held that in such cases the innkeeper had the right to retain the goods for the board of the guest against the claim of the lawful owner,⁶³ unless the innkeeper knew that the

Am. St. Rep. 238, citing *Hutch. on Carr.* gan, 23 Ill. App. 489. See *ante*, § 714.

61. *Compton v. Shaw*, 1 Hun, 441.

62. *Georgia Railroad Co. v. Murray*, 85 Ga. 393, 11 S. E. Rep. 779; *St. Louis, etc., R. Co. v. Flanna-*

63. *Yorke v. Grenaugh*, 2 Ld. Raym, 866; *Snead v. Watkins*, 1 Com. B. (N. S.) 267; *Butler v. Wolcott*, 2 Bos. & P. N. R. 64; *Proctor v. Nicholson*, 7 C. & P.

goods were not the property of the guest at the time of their being brought to his inn.⁶⁴ But it is immaterial whether the chattel be animate or inanimate, or whether its keep is attended with expense to the innkeeper or not. The law gives him his lien upon the carriage as well as upon the horses which draw it, no matter to whom it may belong, if he did not know that it was not the property of the guest when it was brought to the inn, because, as was said, the principle on which an innkeeper's lien depends is that he is bound to receive travelers and their goods which they bring with them to the inn, and, inasmuch as the effect of such lien is to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods which, in the performance of his duty, he is bound to receive.⁶⁵ Indeed, so extensive were the rights of an innkeeper considered that, until the decision in *Sunbolf v. Alford*,⁶⁶ the opinion prevailed that an innkeeper might detain the person of his guest or take off his clothes as security for his bill.⁶⁷

Sec. 883. (§ 490.) Same subject—How compares with innkeeper.—The right of the innkeeper to retain the goods, even of the true owner, for the bill of the guest to whom they do not belong, is put upon the ground that he is obliged to receive the wrong-doer and his goods, and therefore it is reasonable that the right should be co-extensive with the duty, and that he should have his remedy by retaining the latter, if necessary. And as the carrier is under the same legal compulsion, and cannot refuse the goods for carriage unless he knows that they are not the property of the person who offers them, he is, for the same reason, entitled to the same security. In fact, it was first held that, for this reason, the carrier was entitled to the lien upon property committed to him by the wrong-doer, and the innkeeper, being equally without the power to choose

67; *Binns v. Pigot*, 9 *id.* 208;
Johnson v. Hill, 3 *Stark.* 172;
Smith v. Dearlove, 6 *Com. B.* 132.

64. *Broadwood v. Granara*, 10
Exch. 417.

65. *Turrill v. Crawley*, 13 *Q. B.*
 197.

66. 3 *M. & W.* 248.

67. *Bacon's Abridg.*, "Inns and
 Innkeepers, D."

whether he would receive the guest and the goods or not, was, *in consimili casu*, brought within the same exception.⁶⁸

Sec. 884. (§ 491.) Same subject—No lien where goods received from tortious holder.—In this country the law upon the question does not seem to be so well settled. But few cases have occurred, it seems, in regard to the right of innkeepers, under such circumstances, to retain the property of another, brought to the inn by a guest. Whenever the subject has been referred to, it has been conceded that the lien in favor of the innkeeper attaches to the goods even when not owned by the guest.⁶⁹ But it has been held in several cases that a carrier acquires no right, by virtue of his employment as such, to hold the goods delivered to him by a wrong-doer, to whom they do

68. *Yorke v. Grenaugh*, 2 Ld. Raym. 866; Cross on Liens, 286.

The language in the report of this case upon this point is as follows: "But divers exceptions were taken by Darnall, Queen's Sergeant, to the avowry. 1. That since the horse was brought to the inn by a stranger, the innkeeper cannot detain it for its meat against the right owner. For it may be that this traveler was a wrong-doer or a robber. *Sed non allocatur*. For, *per curiam*, supposing this traveler was a robber and had stolen this horse, yet if he comes to an inn and is a guest there, and delivers the horse to the innkeeper (who does not know it), the innkeeper is obliged to accept the horse; and then it is very reasonable that he shall have a remedy for payment, which is by retainer. And he is not obliged to consider who is the owner of the horse, but whether he who brings him is his guest or not. And Holt, chief justice, cited the case of the Exeter carrier, where A. stole goods and de-

livered them to the Exeter carrier to be carried to Exeter, and the right owner finding the goods in possession of the carrier demanded them of him; upon which the carrier refused to deliver without being paid for the carriage. The owner brought trover, and it was held that he might justify detaining against the right owner for the carriage; for when A. brought them to him, he was obliged to receive them and carry them; and, therefore, since the law compelled him to carry them, it will give him remedy for the premium due for the carriage. The same reason holds in this case. But Powell, justice, said that a carrier could not detain for his carriage; but note, the contrary has always been held by Holt, chief justice at Guildhall."

See also, *Brown Shoe Co. v. Hunt*, 103 Iowa, 586, 72 N. W. Rep. 765, 64 Am. St. Rep. 198.

69. *Fox v. McGregor*, 11 Barb. 41; *Manning v. Hollenbeck*, 27 Wis. 202; *King v. Richards*, 6 Whart. 418.

not belong, until his charges are paid, against the claim of the true owner, and that he therefore has no lien upon them, but must, on demand, surrender them to the owner.⁷⁰ This rule is

70. *Fitch v. Newberry*, 1 Doug. (Mich.) 1; *Van Buskirk v. Purinton*, 2 Hall, 561; *Collman v. Collins*, *id.* 569; *Robinson v. Baker*, 5 Cush. 137; *Stevens v. The Railroad*, 8 Gray, 262; *Clark v. The Railroad*, 9 *id.* 231; *Gilson v. Gwinn*, 107 Mass. 126; *Travis v. Thompson*, 37 Barb. 236; *Marsh v. Railway Co.*, 3 McCrary, 236; *Railway Co. v. Tolbert*, 123 Ga. 378, 51 S. E. Rep. 401, citing *Hutch. on Carr.*

But see *King v. Richards*, *supra*, where it is admitted that the lien exists, under such circumstances, in favor of the carrier.

In *Robinson v. Baker*, Fletcher, J., after noticing several of the earlier cases upon the subject, thus states his reasons for denying the lien:

"Thus the case stands upon direct and express authorities. How does it stand upon general principles? In the case of *Saltus v. Everett*, 20 Wend. 267, it is said: 'The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and consequently that even the honest purchaser under a defective title cannot hold against the true proprietor? There is no case to be found, or any reason or analogy anywhere suggested in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently. If the owner loses

his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use, by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation or for work to be done upon it, the owner can follow and reclaim it in the possession of any person, however innocent. Upon this settled and universal principle, that no man's property can be taken from him without his consent, express or implied, the books are full of cases, many of them hard and distressing cases, where honest and innocent persons have purchased goods of others, apparently the owners, and often with strong evidence of ownership, but who yet were not the owners, and the purchasers have been obliged to surrender the goods to the true owners, though wholly without remedy for the money paid. There are other hard and distressing cases of advances made honestly and fairly by auctioneers and commission merchants upon pledge of goods by persons apparently having the right to pledge, but who, in fact, had not any such right, and the pledgees have been subject to the loss of them by the claim of the rightful owner. These are hazards to which persons in business are continually exposed by the operation of this universal principle, that a man's property cannot be taken from him without his consent. Why should the carrier be exempt from the op-

based upon the universally recognized principle that no person's property can be taken from him without his consent, expressed or implied. It is not a harsh rule, as applied to common carriers, since they always have the right to demand of the consignor their transportation charges in advance. And the rights of a connecting road are no better in this respect than those of the initial carrier.⁷¹

Sec. 885. (§ 491a.) Same subject—Lien exists where goods received from one clothed with apparent authority by owner.—But where, on the other hand, the owner of the goods has clothed another with apparent authority to deal for him with reference to the goods, and the carrier receives the goods from such person, it is held that he is entitled to his lien.⁷²

This question has most frequently arisen in cases where the last of two or more connecting carriers claims a lien upon the goods, which is disputed on the ground that the delivery to

eration of this universal principle? Why should not the principle of *caveat emptor* apply to him? The reason, and the only reason given, is, that he is obliged to receive goods to carry, and should therefore have the right to detain the goods for his pay. But he is not bound to receive goods from a wrong-doer. He is bound only to receive goods from one who may rightfully deliver them to him, and he can look to the title as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods unless the freight or pay for the carriage is first paid to him; and he may in all cases secure the payment of the carriage in advance. In the case of *King v. Richards*, 6 Whart. 418, it was decided that a carrier may defend himself from a claim for goods by the person who deliv-

ered them to him, on the ground that the bailor was not the true owner, and therefore not entitled to the goods. The common carrier is responsible for the wrong delivery of goods, though innocently done, upon a forged order. Why should not his obligation to receive goods exempt him from the necessity of determining the right of the person to whom he delivers the goods, as well as from the necessity of determining the right of the persons from whom he receives goods?"

71. *Railway Co. v. Tolbert*, 123 Ga. 378, 51 S. E. Rep. 401.

And if the carrier sells the goods to satisfy his freight charges, he will be guilty of a conversion. *Siefert v. Railway Co.* (Tex. Civ. App.) 57 S. W. Rep. 899. See *post*, § 889.

72. *Vaughan v. Railroad Co.*, 13 R. I. 578.

him for carriage was unauthorized. As has been seen,⁷³ where goods are delivered to a carrier for transportation beyond his own line, he has implied authority, in the absence of an apparent limitation, to send them forward by the usual route or by any customary and proper route, and where he does so the succeeding carrier, having no notice of any limitation upon the first carrier's authority, is not to be deprived of his lien because the first carrier, by mistake or otherwise, sends the goods to the wrong place⁷⁴ or by the wrong route.⁷⁵ Where, however, the succeeding carrier knows or has good reason to believe that the goods are delivered to him for carriage in violation of the instructions of the owner, he cannot maintain a lien.⁷⁶

Sec. 886. (§ 491b.) Whether property of government subject to lien.—The property of the United States government, delivered to the carrier for transportation, is held to be subject to the carrier's lien like that of a private person.⁷⁷

Sec. 887. (§ 492.) Lien discharged by tender.—When a lien consists merely in the right to retain possession of the chattel as security for the performance of a contract or duty to which the owner is bound, it would seem to be the general rule of law that a tender of performance, when refused by the bailee, has the same effect in putting an end to the right to retain the pos-

73. See *ante*, § 129 *et seq.*; *Price v. Railroad Co.*, 12 Colo. 402.

74. *Vaughan v. Railroad Co.*, 13 R. I. 578; *Patten v. Railway Co.*, 29 Fed. Rep. 590; *Whitney v. Beckford*, 105 Mass. 267; *Briggs v. Railroad Co.*, 6 Allen, 246; *For-dyce v. Johnson*, 56 Ark. 430, 19 S. W. Rep. 1050, citing *Hutch. on Carr.*

75. *Price v. Railroad Co.*, 12 Colo. 402; *Crossan v. Railway Co.*, 149 Mass. 196, 21 N. E. Rep. 367.

76. Where goods are sent by one line to be delivered to a particular line designated for further

shipment, but the first carrier willfully violates the instructions and delivers the goods to a competing line in pursuance of an illegal contract to so turn over to that line all goods received for transportation on the designated line, the second carrier cannot maintain a lien even though he may not have known that in this instance the shipper's instructions had been violated. *Denver, etc., Ry. Co. v. Hill*, 13 Colo. 35.

77. *Union Pac. Ry. Co. v. United States*, 2 Wyo. 170, citing *United States v. Wilder*, 3 Sumn. 308;

session, and therefore to the lien, as if accepted. It has been so held in regard to the lien of the vendor, which, it is said, is merely a right granted to him by the law to obtain payment of the price.⁷⁸ And where a tender was made to the bailee of the amount of compensation for his work upon the chattel to which its owner thought he was entitled, which was refused because less than the bailee charged for his work, it was held that the question of the amount of compensation, not being settled by the agreement of the parties, was one of fact to be settled by a jury, and that if the amount tendered was found to have been reasonable, though less than the amount claimed, the lien was forever gone, and that the owner could recover the chattel, though he would still be personally bound for the debt.⁷⁹

Sec. 888. (§ 493.) Lien not assignable.—The lien of the carrier, like that of the factor or agent, attaches to the goods strictly as a personal right or privilege, and does not pass with a sale or pledge, or any other tortious transfer of them by him; nor can the person who thus comes into the possession of them avail himself of such lien against the claim of the real owner. And where the property had been levied upon, as that of the bailor to whom it did not belong, and taken from the carrier, it was held in an action against the person who had thus acquired its possession that the lien of the carrier, even if he had any (which was denied), could not be set up by the defendant, and that no question as to his lien could arise except between the owner of the goods and the carrier himself.⁸⁰ So if the carrier has delivered the goods to a person wrongfully claiming them, they cannot be detained by the person thus coming into their possession by reason of any charges which the carrier may have had upon them, although such charges have been paid to him by the person who is sued for the goods.⁸¹ The

The *Siren*, 7 Wall. 152; The *Davis*, 10 Wall. 15.

78. *Martindale v. Smith*, 1 Q. B. 389.

79. *Moynahan v. Moore*, 9 Mich.

9.

80. *Ames v. Palmer*, 42 Me. 197; *Everett v. Saltus*, 15 Wend. 474;

Rosencranz v. Swofford Bros., 175 Mo. 518, 75 S. W. Rep. 445, 97

Am. St. Rep. 609.

81. *Lempriere v. Pasley*, 2 T. R.

case would be different, however, if the person from whom the goods are claimed held them as the servant or bailee of the carrier, and subject to his lien.⁸²

Sec. 889. (§ 494.) Carrier cannot sell the goods for his charges.—At common law and without some statutory authority, the carrier, as has been seen, cannot sell the goods for his charges upon them. The lien confers no such right. It consists merely in the right to keep or detain the goods; and if the consignee or owner refuse to pay for the carriage and take them, the remedy of the carrier is to have them sold under a judicial order or legal process, to be obtained by a proceeding in equity. A sale without some such authority would be a conversion by the carrier, and he would thereby become liable to whatever damage the owner might sustain by the illegal act, and the purchaser would acquire no title.⁸³ Where there is a statute authorizing the sale, the sale must be fairly conducted,⁸⁴ and held at the time and upon the notice provided by the statute.⁸⁵

485; *Dewell v. Moxom*, 1 Taunt. 391.

82. *Everett v. Saltus*, *supra*; *Western Trans. Co. v. Barber*, 56 N. Y. 544; *Alden v. Carver*, 13 Iowa, 253.

83. *Fox v. McGregor*, 11 Barb. 41; *Jones v. Pearle*, 1 Strange, 556; 2 Kent's Com. *supra*; *Ran-kin v. Packet Co.*, 9 Heisk. 564; *Binns v. Pigot*, 9 C. & P. 208;

Briggs v. The Railroad, 6 Allen, 246; *Hunt v. Haskell*, 24 Me. 339; *Grace v. Palmer*, 8 Wheat. 605; *Chandler v. Belden*, 18 Johns. 157; *Siefert v. Railway Co.* (Tex. Civ. App.) 57 S. W. Rep. 899.

84. *Nathan Bros. v. Shivers*, 71 Ala. 117.

85. *Martin v. McLaughlin*, 9 Colo. 153.

CHAPTER XI.

OF CARRIERS OF PASSENGERS.

I. OF PASSENGER CARRIERS GENERALLY.

§ 890. Distinction between common carrier and carrier of passengers.

891. Not common carrier in transportation of slaves.

892. Carrier of passengers not insurer of their safety—Liable only for negligence.

1. *Degree of care and diligence required.*

893. Degree of care and diligence required of passenger carriers.

894. Same subject.

895. Same subject.

896. Same subject—Bound to protect as far as human care and foresight will go.

897. Same subject—Limitations to the rule.

898. Degree of care required may vary with the circumstances—Duty to warn passenger of danger.

899. Same subject—When passengers are carried on freight or mixed trains.

900. Risks which the passenger takes upon himself—Carrier not liable for mere accidents or casualties which human prudence could not foresee.

§ 901. Same subject.

2. *Duty as to means of conveyance.*

902. Carrier's responsibility for the safety of his means of conveyance.

903. Same subject—Liability for latent defects.

904. Same subject.

905. Same subject—The English rule.

906. Responsibility for defects in vehicles and machinery attributable to the fault of the manufacturer.

907. Same subject.

908. Same subject.

909. Same subject—Carrier responsible to passenger for negligence of manufacturer.

910. Same subject—Same rule applies to bridges.

911. Responsibility for equipping vehicles with unsafe appliances—Duty as to management of appliances.

912. Responsibility for injuries caused by escaping sparks or cinders.

913. Liability of carrier where the immediate cause of the injury is the negligent act of a third person.

- § 914. Liability of carrier where injury is due to an intervening cause.
915. Liability of railway carrier having running powers over other road.
916. Liability of carrier for safety of intermediate agencies employed.
917. Liability for injury caused by concurrent action of two carriers.
918. Liability of carrier for acts of lessees, etc.—Liability for acts of receiver.
919. Liability of carrier for the negligence of an independent contractor.
920. Liability for injury caused passenger by article brought into vehicle by other passenger.
921. Same subject — Dangerous articles.
922. Duty of carrier to supply vehicles with necessary service and accommodations.
923. Duty in respect of management and running of trains and vehicles.
924. Same subject — Duty to avoid sudden jerks and jars.
925. Same subject—Duty to keep track free from obstructions—Duty to avert injury from obstructions placed near track.
926. Same subject—Duty as to speed of trains.
927. Same subject—Doors and windows — Vestibuled trains.
3. *Duty as to station facilities.*
- § 928. Duty of railway carriers in respect to platforms, approaches and station accommodations.
929. Same subject—Like accommodations not required at all stations.
930. Same subject—Where railroad line or station facilities are still in process of construction.
931. Same subject — Equipment and heating of waiting rooms—Retiring places.
932. Same subject — Baggage rooms.
933. Same subject—Liability for unsafe platforms.
934. Same subject — Passengers must use platforms intended for them.
935. Same subject—Liability for obstructions on platforms.
936. Same subject—Liability for not lighting stations.
937. Same subject—Duty in respect to providing means for getting to or from stations and trains.
938. Same subject—How where station facilities are not owned by the railroad company—Union depots.
939. Same subject — Passenger not justified in incurring danger to avoid inconvenience.
940. Same subject—Not liable for not guarding against accidents not reasonably to be anticipated.
941. Same subject—The degree of care required.
942. Duty of carriers by water in respect to wharves, approaches and station facilities.

- § 943. Power of carriers to adopt regulations as to admissions into their stations and depots.
944. Same subject—Right of railway companies to exclude all but certain favored hackmen from their grounds—Courts which uphold such right.
945. Same subject—Courts which deny such right.
946. Power of railway company to grant exclusive access to its terminal wharf to favored steamboat line.
4. *Duty to keep roads, vehicles, etc., in repair.*
947. Duty as to roads when provided by themselves.
948. Same subject—Not liable for defect in road caused by accident which could not have been foreseen—Storms, floods, snow-slides, etc.
949. Same subject—Liability for unsound rails, defective switches, etc.
950. Same subject—No liability when injury caused by a stranger.
951. Same subject—Liability for not discovering defect.
952. Responsibility for not adopting useful improvements which may promote the safety of the passenger.
953. Same subject.
954. Same subject—Duty of railroad company to maintain "whip lashes" near overhanging structures or bridges.
- § 955. Duty of railroad company to maintain fences along its right of way.
956. Duty as to examination of vehicles and other apparatus.
957. Same subject.
5. *Duty as to servants employed.*
958. Responsibility for the character of servants employed.
959. Same subject—Liable for their negligence, imprudence or incompetency.
960. Same subject—Companies and corporations liable.
961. Same subject—Liability for knowingly retaining unfit servants—Ratification.
6. *Duty to accept passenger.*
962. Their duty to accept as passengers those who offer themselves for carriage.
963. Same subject.
964. Same subject—Right to be carried on freight trains.
965. Same subject—Right to be carried on special or emergency trains.
966. What persons the carrier may refuse to accept.
967. Same subject—Right to exclude the blind.
968. Same subject—Right to exclude the insane.
969. Same subject—Right to exclude intoxicated persons.
970. Same subject—Right to exclude persons who interfere with the interests or business of the carrier.
971. Duty and liability as to carrying prisoners.

7. *Separation of passengers for sex, color, etc.*
- § 972. Passengers may be separated according to sex, character, etc.—Color discriminations.
973. Same subject—Contract of carriage made subject to such regulations.
8. *Ejection of passenger for misconduct.*
974. But when once accepted, a passenger cannot be ejected unless guilty of some misconduct.
975. Same subject—Not to be ejected for supposed bad character if properly conducting himself.
976. Same subject—When one passenger may be ejected for misconduct of another.
977. When the passenger may be ejected for improper conduct.
978. Same subject—Ejection of drunken passengers.
979. Same subject—Breach of table manners.
9. *Duty to protect passenger.*
980. Duty of the carrier to protect the passenger.
981. Same subject — Carrier bound to protect against assaults which might reasonably be expected.
982. Same subject — Carrier's duty to protect female passengers.
983. Same subject—Carrier not liable for accidents arising from rudeness or incivility of fellow-passengers.
- § 984. Same subject—Duty to restrain or eject drunken passengers.
985. Same subject—Duty of carrier to guard against careless use of firearms.
986. Same subject — Carrier's duty to protect passengers from injuries by strikers.
987. Same subject—Duty of carrier to protect passenger from arrest.
988. Same subject—Duty of carrier to protect its passengers against acts of violence by passengers who have been ejected or have alighted.
989. Same subject—Duty of carrier to protect passenger while in station or depot.
990. Difference between passenger and stranger or trespasser as to degree of care and diligence to be used.
991. Same subject—Duty to persons coming to stations to assist passengers.
992. Duty of carrier toward sick, aged and disabled passengers.
993. Same subject—Blind and deaf passengers.
994. Duty toward intoxicated passengers.
995. Degree of care required in the carriage of children.
996. Duty to furnish assistance to passengers who have fallen from train.
10. *Who are passengers.*
997. Who entitled to be considered a passenger.
998. Same subject — Authority of carrier's employes to create relation of passenger.

- § 999. Same subject—Persons not passengers who voluntarily ride in places not intended for passengers.
1000. Same subject—Riding on freight trains, engines, hand-cars, etc.
1001. Same subject—Trespassers, tramps, defrauders, etc.
1002. Same subject — Passenger by mistake on wrong train is not a trespasser.
1003. Same subject—Person riding on “drover’s pass.”
1004. Same subject—Person riding on “employee’s pass.”
1005. Same subject—May become passenger before entering vehicle—Effect of signal to stop.
1006. Same subject — Person waiting to take train entitled to protection—Person pursuing departing train—Spectators.
1007. Same subject—May be passenger though received in vehicle before ready to start.
1008. Same subject—Prepayment of fare not necessary.
1009. Same subject — Injury while waiting but before purchase of ticket.
1010. Same subject—Is a passenger while coming to station on carrier’s vehicle.
1011. Same subject—Injury to passenger on platform by objects thrown from passing train — Coal — Stick of wood — Mail bags.
1012. Same subject — Continues to be passenger though temporarily absent from vehicle.
- § 1013. Same subject—Does not cease to be passenger by assisting carrier in emergency.
1014. Same subject—Does not cease to be passenger by remaining on train after reaching his first destination with the intention to continue his journey to another point.
1015. Same subject—What elements must exist.
1016. Same subject—How long the relation of carrier and passenger continues.
1017. Same subject — Duty of protection does not depend on contract alone—Mail-carrier — Servant — Excursionist — Sunday traveler.
1018. Same subject — Duty to one not passenger but lawfully on train—Express messenger—Porter — News agent—Lumberman.
1019. Same subject—Payment of fare not necessary to constitute a passenger.
1020. Same subject — Child or other person carried free as passenger.
11. *Gratuitous passenger.*
1021. Care and diligence due to a gratuitous passenger.
1022. Same subject—The rule stated.
12. *Fare and its payment.*
1023. Amount of fare — State regulation — Discrimination.
1024. Payment of fare—How made—Making change.

- § 1025. Same subject—Who liable for fare — Adult and child.
1026. Same subject—Paying fare or buying ticket with counterfeit money.
1027. Same subject—Effect of statutory requirement that conductor wear badge to show his authority to collect fares.
13. *Tickets.*
1028. The contract to carry—Tickets.
1029. Such tickets in universal use.
1030. Duty to sell tickets to those applying for them.
1031. Effect of exchange of tickets on stipulations therein.
1032. Carrier may require passengers to purchase tickets and exhibit them before entering trains.
1033. Same subject—Requiring higher fare when paid on train—Reasonable facilities for procuring ticket must be furnished.
1034. Same subject—Waiver of right to demand higher fare when paid on train.
1035. Same subject—Carrier may abandon custom to sell tickets at reduced rates.
1036. Same subject—Ticket must be produced when called for—Lost, mislaid or forgotten tickets.
1037. Same subject—Rebate or train tickets given on payment of cash fare must be produced when called for.
1038. Same subject—Right to require surrender of ticket.
- § 1039. Same subject.
1040. Same subject—Torn or mutilated tickets.
1041. In absence of contract, ticket presumed to be for continuous trip — Stop-over.
1042. Same subject — Through passenger cannot claim the advantage of local excursion or competitive rates between intermediate points.
1043. Same subject—Limitations as to time within which ticket is good for use.
1044. Same subject.
1045. Same subject.
1046. Same subject.
1047. Same subject.
1048. Rule different in case of coupon tickets.
1049. Coupon ticket does not usually import contract of through carriage.
1050. Same subject — But contract for through carriage may be so made.
1051. Effect of non-designation of route in ticket when there is a longer and shorter route.
1052. If ticket does not express the entire contract, it may be shown by other proof.
1053. Passenger is bound by terms of ticket contract.
1054. Same subject—Round-trip ticket requiring identification.
1055. Same subject — Provision that coupon shall not be good if detached.
1056. Same subject — Provision that ticket shall not be transferable.

- § 1057. Same subject—Passenger should truthfully answer questions of conductor concerning his identity.
1058. Same subject—Provision that ticket shall not be good on certain trains.
1059. Same subject—Passenger can go only in direction which ticket indicates.
1060. Same subject—How when train does not stop at passenger's destination.
1061. Same subject—How when by mistake he is given obviously wrong ticket.
1062. Same subject—How when ticket is apparently good.
1063. Same subject—Where two or more roads employ a joint ticket agent—Which road liable for his mistakes.
1064. Same subject—Where conductor on first line tears off coupon of second line.
1065. Same subject—As between passenger and conductor the ticket produced must govern.
1066. Same subject—But passenger is not without remedy.
1067. Right of passenger to rely on instructions given him.
1068. When passenger's ticket has been purchased for him by third person.
14. *Limitation of carrier's liability.*
1069. Passenger carrier cannot limit his liability by notice or regulation—Conclusiveness of contract.
- § 1070. Same subject—Good faith required on part of carrier.
1071. Same subject—When limitation inures to benefit of connecting carrier.
1072. Right of the carrier to provide against liability for injuries to the passenger from the negligence of the carrier or his servants.
1073. Same subject—Actual payment of cash fare not necessary in order to render stipulations against liability for negligence void.
1074. Same subject—No distinction made in these cases as to degree of negligence.
1075. Rule where free passes are issued on condition of no liability.
1076. Carrier may enter into contract of indemnity with insurance company.
15. *Regulations of the carrier.*
1077. The passenger must conform to the reasonable regulations of the carrier, and may be ejected for refusal.
1078. Same subject.
1079. Same subject.
1080. Regulation of carrier may be waived by usage—Authority of an agent to waive.
1081. Carrier liable if wrong person expelled for breach of regulations.
16. *Ejection of passenger for breach of regulations.*
1082. At what place passenger may be ejected.

- § 1083. Same subject—Ejection of females and sick or intoxicated passengers.
1084. The right to eject must be exercised in a proper manner.
1085. Effect of tender after refusal to pay or show ticket and ejection begun.
1086. Duty of carrier to tender back fare received before ejection.
1087. Duty of carrier to tender back fare received when parent is ejected for non-payment of child's fare.
1088. Duty of carrier to return ticket claimed to be void or worthless ticket before ejecting passenger.
1089. The right to resist ejection—May resist ejection from train in rapid motion.
1090. Same subject—Resistance when rightfully on train—Resistance not necessary to preserve passenger's rights—Damages for injuries received while resisting.
1091. Whether due care has been used, a question of fact.
1092. Relation of carrier and passenger does not cease on wrongful ejection.
17. *The treatment of the passenger.*
1093. The treatment due the passenger.
1094. Liability of carrier for ill-treatment of passenger—Liable for assaults by brakemen and conductors.
- § 1095. Same subject—Liable for assaults by porters or omnibus guards.
1096. Same subject—Like rule governs as to liability of carrier by water for assault by servants.
1097. Same subject—Exemplary damages allowed.
1098. Same subject—Early overruled cases in New York hold carrier not liable for assault by servant not acting in line of his duty.
1099. Liability of carrier for assault by servants in station or before or after the existence of the relation of carrier and passenger.
1100. Liability of carrier for wrongful arrest of passenger by carrier's servants.
1101. Liability for indecent assaults on female passengers.
1102. Liability of carrier where ill-treatment is provoked by the passenger.
18. *Duty as to beginning, continuing and ending the transportation.*
1103. The time at which the carrier must commence and complete the transportation.
1104. Must use diligence to conform to published schedules and notices.
1105. Same subject.
1106. Same subject.
1107. Same subject.
1108. How when a train is late—Statements of agent as to when it will arrive or depart.

- § 1109. Liability for detention of the passenger.
1110. Duty to stop trains for passengers at regular or flag stations and at passenger platforms.
1111. Passenger must be allowed reasonable opportunity to enter vehicle in safety.
1112. Helping passengers to enter train.
1113. Carrier must furnish sufficient room and reasonable accommodations — Right of passenger to a seat before surrendering ticket.
1114. Same subject — Extraordinary and unexpected demand will excuse.
1115. Same subject—When passengers are carried in baggage car.
1116. Carrier must allow customary intervals for refreshment and give notice of departure.
1117. Passenger must be put down at usual place of stopping.
1118. Carrier must give sufficient time to alight.
1119. Same subject—Not liable where reasonable time and opportunity given, but passenger has delayed.
1120. Same subject—Not liable where passenger has evaded payment of fare.
1121. Must give notice of arrival at stations.
1122. Must be careful not to invite the passenger to alight at an improper time or place.
1123. Same subject—Effect of calling name of station.
- § 1124. Same subject—Where announcement is made by stranger.
1125. Same subject—Effect of notice to passengers to take other cars.
1126. Same subject — Carrying passengers past platforms or stations.
1127. Helping passengers to alight.
1128. Awakening sleeping passengers.
1129. Furnishing passengers necessary instructions.
- II. SLEEPING AND PARLOR CARS.
1130. Sleeping-car companies not common carriers or innkeepers, but bound for reasonable care.
1131. Same subject — Negligence the test of liability.
1132. Same subject—Limit of the liability.
1133. Same subject — Liability while passenger is away from berth.
1134. Same rules apply to parlor-car companies.
1135. Railroad company liable as common carrier to passenger of sleeping-car.
1136. Railroad company entitled to determine who shall occupy sleeping-cars.
1137. Sleeping-car company not responsible for train connections.
1138. Responsibility of sleeping-car company where sleeping-car does not go over the same line of railroad that passenger's ticket calls for.
1139. Duty of sleeping-car company to furnish berth.

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| <p>§ 1140. Duty of sleeping-car company to furnish means of getting into or out of berth.</p> <p>1141. Passenger entitled to occupy only the berth he pays for.</p> <p>1142. Duty to awaken passengers in time to alight.</p> <p>1143. Duty to ventilate and heat cars.</p> <p>1144. Duty to keep aisles free from obstructions.</p> <p>1145. Liability of sleeping-car company for assaults by its servants on passengers or for wrongful expulsion.</p> <p>1146. Liability of sleeping-car company for baggage in custody of porter while lady passenger is leaving train.</p> <p>III. PASSENGER CARRIERS BY WATER.</p> <p>1147. Are subject to general rules regulating other carriers.</p> <p>1148. Statutory regulation.</p> <p>1149. Penalties imposed for dangerous practices.</p> <p>1150. Licensing officers, etc.</p> <p>1151. Statutory regulations for safety.</p> <p>1152. Government of merchant vessels.</p> <p>1153. Regulations to prevent collisions.</p> <p>1154. Purpose of these regulations.</p> | <p>§ 1155. These regulations do not lessen liability of carrier for safe carriage of passengers.</p> <p>1156. Duty to furnish passengers with food and other necessities.</p> <p>1157. Same subject.</p> <p>1158. Same subject — Steerage passengers.</p> <p>1159. Authority of master.</p> <p>1160. Same subject.</p> <p>1161. Duty of master to provide for safety, health and comfort of passengers.</p> <p>1162. Same subject—Duty in respect of women and children.</p> <p>1163. Same subject—Duty to aid sick or disabled passengers.</p> <p>1164. Passenger must conduct himself properly.</p> <p>1165. Duty to furnish berths.</p> <p>1166. How far carrier by water bound by schedule as to leaving.</p> <p>1167. Same subject—Carrier by water not bound to deliver telegrams addressed to passengers.</p> <p>1168. Passengers may refuse to be carried in unseaworthy ship.</p> <p>1169. Liability of carrier by water continues until passenger and his baggage are safely landed.</p> |
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I. OF PASSENGER CARRIERS GENERALLY.

Sec. 890. (§ 495.) Distinction between common carrier and carrier of passengers.—Public carriers may not only be carriers of goods, but carriers of persons also, and while carrying the

goods may at the same time carry their owners. As to the one, in such a case, the carrier would be a passenger carrier, and as to the other, a common carrier of goods; and although he might carry them both upon the same conveyance, and at the same time, the nature of the responsibility which he would incur as to them would be very different; and this difference in the kind of responsibility which the law imposes upon him exists even between the passenger and his baggage, as to which, as we have seen, the carrier becomes responsible as a common carrier of goods, although its carriage is merely incidental to the carriage of the passenger. Of the goods he must have, in order to impose upon him the responsibility of a common carrier, the absolute and unlimited control, and the law supposes that their safety, aside from the acts of God and the public enemy, against which it protects him, depends entirely upon the care and faithfulness with which he discharges his trust. But the passenger being endowed with intelligence and the power of locomotion, which enable him, in a great measure, to foresee and avoid danger, the exercise of at least ordinary prudence is required on his part to escape it, and if by his failure to exercise these faculties for his own preservation, a misfortune befall him, though the carrier may have been in fault, it will be attributed to his own carelessness and inattention, and the responsibility will not be thrown upon the carrier.¹

Sec. 891. (§ 496.) Not common carrier in transportation of slaves.—This distinction was made the ground of the decision of the supreme court of the United States in *Boyce v. Anderson*,² which was an action against a carrier to recover damages

1. A passenger on a freight boat voluntarily left a place of safety on the boat and went to another part of the boat where lumber was being thrown overboard. While standing near a large beam which was being discharged over the side of the boat, he received a violent blow on the head by that part of the beam which was still over the boat. He had gone to the rail to see what would happen when the beam struck the water. The vessel was held not liable for the injury. *Elder Dempster Shipping Co. v. Pouppirt*, 125 Fed. 732, 60 C. C. A. 500, reversing *Pouppirt v. Elder, etc., Shipping Co.*, 122 Fed. 983.

2. 2 Peters, 150.

for the loss of certain slaves, who were the property of the plaintiff, and had been drowned, as was alleged, by the negligence of the carrier or his servants whilst in his charge. "A slave," said Marshall, C. J., in giving the opinion of the court, "has volition, and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently, this rigorous mode of proceeding cannot safely be adopted unless stipulated for by special contract. Being left at liberty, he may escape. The carrier has not and cannot have the same absolute control over him that he has over inanimate matter. In the nature of things and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods. There are no slaves in England, but there are persons in whose service another has a temporary interest. We believe that the responsibility of a carrier for injury which such person may sustain has never been placed on the same principle with his responsibility for a bale of goods. He is undoubtedly answerable for any injury sustained in consequence of his negligence or want of skill; but we have never understood that he is responsible further. The law applicable to common carriers is one of great rigor. Though to the extent to which it has been carried, and in the cases to which it has been applied, we admit its necessity and its policy, we do not think it ought to be carried further, or applied to new cases. We think it has not been applied to living men, and that it ought not to be applied to them."

Sec. 892. (§ 497.) Carrier of passengers not insurer of their safety—Liable only for negligence.—Consequently, the policy of the law, as it is called, which induced the judges in early times to establish the rule of the extraordinary responsibility of common carriers as to the goods intrusted to them, the reasons for which, as stated by Lord Holt, were to prevent them

from clandestine combinations with thieves and robbers, to the undoing of all persons who had dealings with them, was never applicable to carriers of passengers. They are not, as to the persons of those whom they carry, common carriers, and the law which holds the latter accountable for losses and injuries to the goods, unless occasioned by inevitable accident, which makes them, in other words, insurers of the safety of the goods against all events except the acts of God and the public enemy, is wholly to be disregarded when the question is between the carrier and the passenger as to the liability of the carrier for an injury sustained by the passenger whilst being transported by him. When the goods are lost or damaged, as has been seen, it will not avail the common carrier to prove that there was no want of diligence or care on his part. The question of care, skill or diligence, independently of contract, can cut no figure in such a case, and the liability is absolute unless occasioned by one or the other of the excepted causes. On the other hand, when the attempt is made to hold him responsible for an injury to the person of the passenger, negligence is the essential element in the case, and without either proof or the presumption of its existence the injured party cannot recover.³ The common carrier of goods, for instance, will be liable at all events for depredations upon or destruction of the goods by mobs or robbers, and the violent attacks of all persons who are not pirates or the public enemy, unless he has protected himself against liability for loss occasioned in such manner by his contract; but if the passenger should sustain a personal injury at the hands of such lawless persons whilst being transported by the carrier,

3. *Crofts v. Waterhouse*, 3 Bing. A. 673, citing *Hutchinson on Carr.*; 319; 11 Moore, 133; *Readhead v. Doyle v. The Railroad*, 82 Fed. R'y Co., L. R. 2 Q. B. 412, L. R. Rep. 869, 27 C. C. A. 264, 50 U. S. 4 Q. B. 379; *Aston v. Heaven*, 2 App. 249; *The Oregon*, 133 Fed. Esp. 533; *Camden, etc., R. R. v. 609; Campbell v. Canadian Pac. R'y Co.*, 1 Canadian R'y Cases, Burke, 13 Wend. 611; *Hollister v. 258; Railway Co. v. Cunningham*, Nowlen, 19 *id.* 234; *Stokes v. Sal- 123 Ga. 90, 50 S. E. Rep. 979; tonstall*, 13 Pet. 181; *Taillon v. Tyler v. The Railway (Tex. Civ. Mears*, 29 Mont. 161, 74 Pac. Rep. App.), 79 S. W. Rep. 1075; *Ware v. 421; Railway Co. v. Lippman*, 110 Railroad Co., 119 Ill. App. 456; Ga. 665, 36 S. E. Rep. 202, 50 L. R.

the latter could not be made liable for it in damages, at least, unless, knowing the danger, he had recklessly or negligently exposed the passenger to it when such exposure could have been avoided,⁴ or unless he had failed to protect him when his duty required it.⁵

1. *Degree of care and diligence required.*

Sec. 893. (§ 498.) Degree of care and diligence required of passenger carriers.—It therefore becomes important to inquire as to the degree of skill and care required of the carrier of passengers in his employment, the want of which will constitute such culpable negligence as will make him responsible for the consequential personal injury sustained by his employer. Various terms have been used to express the extent of the obligation of such carriers by different judges. In the first of the cases in which the question was involved,⁶ tried before Lord Kenyon in 1791, it was held by that celebrated judge that mail-coaches, as carriers of passengers, were bound to carry “safely and properly.” In *Crofts v. Waterhouse*,⁷ Park, J., stated the law in these words: “There is a wide distinction between contracts for the conveyance of passengers and those for the conveyance of goods. In the latter case, the parties are liable at all events, except the goods are destroyed or damaged by the act of God or the king’s enemies; whilst in the former case, they are only responsible to their passengers in case of express negligence.” “Carriers of passengers for hire are not responsible in all particulars,” says Parker, C. J., in *Bennett v. Dutton*,⁸ “like common carriers of goods. They are not insurers of personal safety against all contingencies except those arising from the acts of God and the public enemy. For an injury hap-

4. *Pittsburg, etc., R. R. Co. v. Hinds*, 53 Penn. St. 512.

5. See *post*, § 980, *et seq.*

6. *White v. Boulton, Peake’s Cases*, 113. This case was decided by Lord Kenyon in 1791, and is said to have been the first case

ever tried for the recovery of damages for a personal injury done to a passenger by a carrier. Per Hubbard, J., in *Ingalls v. Bills*, 9 Met. 1.

7. 11 Moore, 133.

8. 10 N. H. 481.

pening to the person of a passenger by mere accident, without fault on their part, they are not responsible, but are liable only for want of due care, diligence or skill."

Sec. 894. (§ 499.) Same subject.—From these and other similar general statements as to the nature of the responsibility of passenger carriers, which have been frequently adopted and repeated, it has sometimes been concluded that the degree of care and circumspection required of them is the same as that required of private carriers of goods for hire, and no more;⁹ and to this class of carriers, passenger carriers have been compared in this respect. Other cases, however, have stated the law upon the subject with more strictness as to the degree of caution to be required of the carrier; and while the tendency has been to relax somewhat the rigid rule of the common law in regard to common carriers, and to treat it as the product of a less enlightened age, which should to some extent be modified in order to adapt it to a different state of society, no such disposition has been shown in regard to passenger carriers, and the tendency has been rather the other way, and to hold at least some classes of them to a higher degree of responsibility than was formerly required, in consideration of the vast increase of travel and the more rapid and more dangerous means of conveyance to which the invention of steam has given rise.¹⁰

Sec. 895. Same subject.—In consideration, therefore, of the hazards incident to the more modern modes of travel and the increased dangers to life and limb to which such modes have

9. Upon the ground that the strict rule of the common law as to the extraordinary responsibility of common carriers, introduced for general commercial objects, did not apply to the conveyance of slaves, it was said by Marshall, C. J., in *Boyce v. Anderson*, *supra*, that the ancient rule, "that the carrier is liable only for ordinary neglect," still applied to them. But this opinion, unless a distinction is to be made between slave and other passengers in this regard, was not approved or followed in the subsequent case of *Stokes v. Saltonstall*, 13 Pet. 181, before the same court.

10. See *Goldsmith v. Building Co.*, — Mo. App. —, 81 S. W. Rep. 1112, citing *Hutchinson on Carr.*

given rise, the law very justly holds that, while the carrier of passengers does not warrant the safety of his passengers as the common carrier does that of goods, he is bound to provide for their safe conveyance as far as human care and foresight will go, or, as some courts have expressed it, to exercise for the safety of his passengers while upon his conveyance the highest or utmost degree of care and diligence which human prudence and foresight will suggest in view of the character and mode of conveyance employed. And the degree of care which the law thus exacts of him is stated in the same or equivalent language in nearly all the cases in which his obligation has been defined.¹¹

11. *England*: *Christie v. Griggs*, 2 Camp. 79.

United States: *The Oriflamme*, 3 Sawyer, 397; *Stokes v. Saltonstall*, 13 Pet. 181; *Philadelphia, etc., R. R. v. Derby*, 14 How. 468; *S. B. New World v. King*, 16 How. 469; *Indianapolis, etc., R. R. v. Horst*, 93 U. S. 291; *McKinney v. Neil*, 1 McLean, 540; *Mauzy v. Talmadge*, 2 McLean, 157; *Pendleton v. Kinsley*, 3 Clifford, 416; *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Trumbull v. Erickson*, 97 Fed. Rep. 891, 38 C. C. A. 536; *Cavin v. Southern Pacific Co.*, 136 Fed. Rep. 592; *s. c.* 144 Fed. 348.

Alabama: *Railroad Co. v. Hill*, 93 Ala. 514, 9 So. Rep. 722, 30 Am. St. Rep. 65, citing *Hutchinson on Carr.*; *Railroad Co. v. Greenwood*, 99 Ala. 501, 14 So. Rep. 495.

Arkansas: *Railway Co. v. Murray*, 55 Ark. 248, 18 S. W. Rep. 50, 29 Am. St. Rep. 32, 16 L. R. A. 787.

California: *Green v. Pacific Lumber Co.*, 130 Cal. 435, 62 Pac. Rep. 747.

Connecticut: *Derwort v. Loomer*,

21 Conn. 245; *Hall v. Steamboat Co.*, 13 Conn. 319; *Murray v. The Railroad*, 66 Conn. 512, 34 Atl. Rep. 506, 32 L. R. A. 539.

Delaware: *Mac Feat v. Railroad Co.*, — Del. —, 62 Atl. Rep. 898.

Georgia: *Railway Co. v. Cunningham*, 123 Ga. 90, 50 S. E. Rep. 979; *Holly v. The Railroad*, 61 Ga. 215; *Railway Co. v. Findley*, 76 Ga. 311.

Illinois: *Tuller v. Talbot*, 23 Ill. 357; *Pittsburgh, etc., R. R. Co. v. Thompson*, 56 Ill. 138; *Railway Co. v. Lewis*, 145 Ill. 67, 33 N. E. Rep. 960, *affirming* 48 Ill. App. 274; *Railroad Co. v. Byrum*, 153 Ill. 131, 38 N. E. Rep. 578, *affirming* 48 Ill. App. 41; *Railroad Co. v. Beebe*, 174 Ill. 13, 50 N. E. Rep. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210, *affirming* 69 Ill. App. 363; *Railroad Co. v. Klein*, 43 Ill. App. 63; *Railway Co. v. Hubbard*, 106 Ill. App. 462; *Railroad Co. v. Scott*, 111 Ill. App. 234.

Indiana: *Sherlock v. Alling*, 44 Ind. 184; *Thayer v. The Railroad*, 22 Ind. 26; *Jeffersonville, etc., R. v. Hendricks*, 26 Ind. 228; *Ken-*

Sec. 896. (§ 501.) Same subject—Bound to protect as far as human care and foresight will go.—Although the form of expression is sometimes varied, and the rule is stated as requiring “the utmost diligence of very cautious persons,” “the great-

tucky, etc., *Bridge Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. Rep. 338, citing *Hutchinson on Carr.*

Iowa: *Raymond v. Railway Co.*, 65 Iowa, 152; *Moore v. Railway Co.*, 69 Iowa, 491.

Kansas: *Railroad Co. v. Berry*, 53 Kan. 112, 36 Pac. Rep. 53, 42 Am. St. Rep. 278; *Meador v. The Railway*, 62 Kan. 865, 61 Pac. Rep. 442.

Kentucky: *Railway Co. v. Vivion*, 19 Ky. Law Rep. 687, 41 S. W. Rep. 580.

Maine: *Dunn v. The Railroad*, 58 Me. 187; *Edwards v. Lord*, 49 Me. 279; *Libby v. The Railroad*, 85 Me. 34, 26 Atl. Rep. 943, 20 L. R. A. 812.

Massachusetts: *Ingalls v. Bills*, 9 Met. 1.

Maryland: *Stockton v. Frey*, 4 Gill, 406; *Railroad Co. v. Swann*, 81 Md. 400, 32 Atl. Rep. 175, 31 L. R. A. 313; *Railroad Co. v. Shivers*, — Md. —, 61 Atl. Rep. 618; *Philadelphia, etc., R. Co. v. Allen*, — Md. —, 62 Atl. Rep. 245.

Minnesota: *Johnson v. The Railroad*, 11 Minn. 296; *Wilson v. The Railroad*, 31 Minn. 481; *Benedict v. The Railroad*, 86 Minn. 224, 90 N. W. Rep. 360, 91 Am. St. Rep. 345, 57 L. R. A. 639.

Missouri: *Dougherty v. Railroad Co.*, 97 Mo. 647; *Leslie v. Railroad Co.*, 88 Mo. 55; *Furnish v. Railway Co.*, 102 Mo. 438; 13 S. W. Rep. 1044; *Clark v. The Railroad*, 127 Mo. 197, 29 S. W. Rep. 1013; *Wilburn v. The Railroad*, 48 Mo.

App. 224; *Holland v. The Railroad*, 105 Mo. App. 117, 79 S. W. Rep. 508; *Goldsmith v. Building Co.*, — Mo. App. —, 81 S. W. Rep. 1112.

Montana: *Taillon v. Mears*, 29 Mont. 161, 74 Pac. Rep. 421.

Nebraska: It is held under the Nebraska statute that when a passenger is injured while being transported, a conclusive presumption of negligence will arise, unless the carrier can show that the passenger was guilty of criminal negligence or of a violation of its rules or regulations. See *Railroad Co. v. Wolfe*, 61 Neb. 502, 86 N. W. Rep. 441; *Railroad Co. v. Hague*, 48 Neb. 97, 66 N. W. Rep. 1000. See also, *post*, § 1413, note.

New York: *McPadden v. The Railroad*, 44 N. Y. 478; *Caldwell v. St. Bt. Co.*, 47 N. Y. 282; *Carroll v. The Railroad*, 58 N. Y. 126; *Caldwell v. Murphy*, 1 Duer, 233; *Brand v. The Railroad*, 8 Barb. 368; *Hegeman v. The Railroad*, 13 N. Y. 9; *Maverick v. The Railroad*, 36 N. Y. 378; *Miller v. Steamship Co.*, 118 N. Y. 200; *Palmer v. Canal Co.*, 120 N. Y. 170; *Schloterer v. Ferry Co.*, 78 N. Y. Supp. 202, 75 App. Div. 330.

Oregon: *Budd v. United Carriage Co.*, 25 Or. 314, 35 Pac. Rep. 660, 27 L. R. A. 279.

Pennsylvania: *Meier v. The Railroad*, 64 Penn. St. 225; *New Jersey R. R. v. Kennard*, 21 Penn. St. 203; *Laing v. Colder*, 8 Penn. St. 479; *Sullivan v. The Railroad*, 30 Penn. St. 234; *Smedley v. The*

est possible care and diligence," "the most perfect care of a cautious and prudent man," and other similar phrases, the real meaning intended by them all is that the care and circumspection to be required is the utmost which can be exercised under

Railway, 184 Penn. St. 620, 39 Atl. Rep. 544.

Rhode Island: *Bosworth v. The Railroad*, 25 R. I. 202, 55 Atl. Rep. 490.

Tennessee: *Railroad Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. Rep. 202, citing *Hutchinson on Carr.*

Texas: *Railroad Co. v. Welch*, 86 Tex. 203, 24 S. W. Rep. 390, 40 Am. St. Rep. 829, citing *Hutchinson on Carr.*; *Texas, etc., Ry. Co. v. Davidson*, 3 Tex. Civ. App. 542, 21 S. W. Rep. 68; *San Antonio, etc., Ry. Co. v. Long* (Tex. Civ. App.), 26 S. W. Rep. 114, citing *Hutchinson on Carr.*; *Railway Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. Rep. 608; *Gary v. The Railway*, 17 Tex. Civ. App. 129, 42 S. W. Rep. 576; *Houston, etc., R. Co. v. George*, 1 Tex. Ct. Rep. 376, 60 S. W. Rep. 313; *Railway Co. v. Byers*, 6 Tex. Ct. Rep. 36, 70 S. W. Rep. 558; *St. John v. The Railway* (Tex. Civ. App.), 80 S. W. Rep. 235; *Railroad Co. v. Clark* (Tex. Civ. App.), 81 S. W. Rep. 821; *Boyles v. The Railway* (Tex. Civ. App.), 86 S. W. Rep. 936, citing *Hutchinson on Carr.*; *Missouri, etc., Ry. Co. v. Wolf*, — Tex. Civ. App. —, 89 S. W. Rep. 778; *St. Louis, etc., Ry. Co. v. Parks* — Tex. Civ. App. —, 90 S. W. Rep. 343.

Virginia: *Farish v. Reigle*, 11 Gratt. 697.

Washington: *Williams v. Railway Co.*, 39 Wash. 77, 80 Pac. Rep. 1100.

West Virginia: *Searle v. The Railway*, 32 W. Va. 370; *Fisher v. The Railroad*, 39 W. Va. 366, 19 S. E. Rep. 578, 39 L. R. A. 758.

Wisconsin: *Berry v. Railway Co.*, 73 Wis. 197.

The utmost care and diligence which human prudence and foresight will suggest is the rule laid down in *Palmer v. Canal Co.*, 120 N. Y. 170. Highest practicable care of capable and faithful railroad men is required by other cases. *Furnish v. Railway Co.*, 102 Mo. 438, 13 S. W. Rep. 1044; *Miller v. Steamship Co.*, 118 N. Y. 200; *Searle v. Railway Co.*, 32 W. Va. 370; *Berry v. Railway Co.*, 73 Wis. 197. Utmost caution characteristic of very careful prudent men. *Pennsylvania Co. v. Roy*, 102 U. S. 451. Utmost human foresight, knowledge, care and skill. *Dougherty v. Railroad Co.*, 97 Mo. 647; *Lemon v. Chanslor*, 68 Mo. 340; *Dougherty v. Railroad Co.*, 81 Mo. 330; *Kelly v. Railroad Co.*, 70 Mo. 609; *Leslie v. Railroad Co.*, 88 Mo. 55.

Extraordinary care and caution: *Raymond v. Railway Co.*, 65 Iowa, 152.

Utmost human care and foresight. *Wilson v. Railroad Co.*, 31 Minn. 481. Highest degree of care and diligence which is reasonably within the power of persons engaged in such business. *Van de Venter v. Railway Co.*, 26 Fed. Rep. 32. Highest degree of care and skill. *Moore v. Railway*

all the circumstances, short of a warranty of the safety of the passengers; and the rule cannot, perhaps, be better or more forcibly expressed than in the words of Sir James Mansfield in the case of *Christie v. Griggs*,¹² that the duty of the carrier is to provide for the safety of his passengers "as far as human care and foresight will go." This, at least, is the most common mode of stating it, and the words "as far as human care and foresight will go" have become, from frequent use, a familiar form of expression in connection with the obligation of the passenger carrier. It is not therefore correct to assimilate this duty to that to which the private carrier for hire is bound, or to make the degree of care, which the law requires of the one, the standard by which to measure that which will be demanded of the other.¹³

Sec. 897. (§ 502.) Same subject—Limitations to the rule.—

When it is said, however, that the carrier of the passenger must

Co., 69 Iowa, 491; *Mackey v. Railway Co.*, 18 Fed. Rep. 236; *Dunlap v. Reliance*, 2 Fed. Rep. 249. In Georgia, extraordinary diligence is required, and this is held to mean that extreme care and caution which very prudent and thoughtful persons would exercise under like circumstances. *Railway Co. v. Cunningham*, 123 Ga. 90, 50 S. E. Rep. 979; *Holly v. Railroad Co.*, 61 Ga. 215; *Railway Co. v. Findley*, 76 Ga. 311.

Carriers of passengers are required to do all that human care, vigilance and foresight reasonably can do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers. *Bosworth v. The Railroad*, 25 R. I. 202, 55 Atl. Rep. 490.

Conduct actuated by good faith and an honest purpose to avoid injury to passengers, is not the equivalent of the highest degree of care which the carrier must

exercise. *Railroad Co. v. Greenwood*, 99 Ala. 501, 14 So. Rep. 495.

The general statement that the carrier is bound to exercise the "greatest degree of care and foresight" contemplates a higher degree of care than that imposed by law. It should be qualified with the statement, "as compared with that care and diligence which prudent men engaged in a like business would exercise." *Railway Co. v. Vivion*, 19 Ky. Law Rep. 687, 41 S. W. Rep. 580.

A charge that the carrier is bound to use "greatest possible care necessary," *i. e.*, necessary to prevent the injury, is erroneous. *Gilson v. Railway Co.*, 76 Mo. 282.

12. 2 Camp. (Eng.) 79

13. See *Railroad Co. v. Welch*, 86 Tex. 203, 24 S. W. Rep. 390, 40 Am. St. Rep. 829, citing *Hutchinson on Carr.*; *Hardin v. The*

provide for his safety "as far as human foresight will go," it is not meant that he will be required to exercise all the care and diligence of which the human mind can conceive, or all the skill and ingenuity of which he is capable. It does not, for instance,

Railway, (Tex. Civ. App.) 77 S. W. Rep. 431, citing *Hutchinson on Carr.*; *Railroad v. Thompson*, (Tex. Civ. App.) 77 S. W. Rep. 439, citing *Hutchinson on Carr.*; *Payne v. Halstead*, 44 Ill. App. 97, citing *Hutchinson on Carr.*; *Goldsmith v. Building Co.* — Mo. App. —, 83 S. W. Rep. 1112, citing *Hutchinson on Carr.*

It is argued in *Wharton on Negligence*, secs. 629-637 that the diligence to be required of the carrier of passengers is only that which will be required of "a good business man in his specialty." This is certainly reducing the responsibility of the passenger carrier below the generally accepted standard. A person engaged in any pursuit as a specialty, in which he undertakes to perform service for others for compensation, professes skill adequate to the undertaking and promises due diligence in its performance. But ordinary skill and ordinary diligence are all that the law exacts of him, and if he has used these, he cannot be made liable for a loss or injury to another for whom he has undertaken the service, although it may be shown that a higher degree of skill and diligence would have made the undertaking successful. See *Story on Bailments*, § 431, where several instances are given, and the rule of ordinary skill and diligence is stated to be the test of the liability of an employee for loss or injury in the performance of an undertaking in which he professes skill. This is exactly the degree of care and skill which is required of the private carrier for hire, both of persons and of goods; that is, the exercise of such care and skill as prudent and cautious men, experienced in the business, are accustomed to use under similar circumstances. *Shoemaker v. Kingsbury*, 12 Wall. 369. But it has been generally understood that more than this would be required of the public carrier of passengers. While he does not warrant, for instance, perfection in his vehicles or machinery, yet if there be such defect, and it could have been discovered by any known and usual test applied by such carrier, and an accident be occasioned thereby, from which the passenger suffers injury, the carrier will be liable, and it will be no defense that the defect was hidden from view. And the better opinion, as we think, is, that, at least when he is a carrier by steam power, he will be even responsible for defects occurring in their manufacture, and which could only have been discovered by the manufacturer himself, by the application of tests known to him. *Post*, §§ 906-909. So in the protection which the public carrier is required to afford to his passenger against assaults and violence to his person, and in many other particulars which might be mentioned, the law has imposed duties upon him as to the care to be exercised

require steel rails, or iron or granite cross-ties upon the roads of railway companies, because such ties are less liable to decay, and hence safer than those of wood. Nor does it require the carrier over the public highway to repair it so as to render it,

towards the passenger, which are never required of the good business man in his specialty in behalf of his customers. Another distinction which rests upon the different degrees of care and diligence which are required from the public carriers of passengers, and those engaged in private pursuits, is in the character of the proof necessary to establish a *prima facie* case of liability. In order to fix such liability upon the mere business man, it must be shown that he exercised less than ordinary diligence and less than the ordinary skill possessed by those engaged in the same special pursuit; whereas, in the case of the public carrier of passengers, the proof of the accident from which the injury arose will usually make a *prima facie* case of negligence against him, and it will be then for him to show that due skill and caution had been used, if he would escape liability. This at least illustrates the different aspects in which the law regards such a carrier and the mere specialist, such as the farrier, the oculist, the dentist, etc. The law does not propose to make the passenger carrier an insurer of his safety, as it does the common carrier of the goods which he carries. But it does exact of him all the care and diligence consistent with the character of his business, and its execution according to his professions and the expectations of the public. It will not require

that which is impracticable, but will rigorously require all that is practicable for the safety of the passenger, and, as the cases will show, will hold the carrier and his servants liable for the least neglect of a single practicable and reasonable precaution, where the safety of the passenger is at stake. The highest degree of care and diligence, *diligentia diligentissimi*, is the rule as to the carrier of passengers, and public policy demands that it should not be relaxed. Nor do the cases show any tendency towards its relaxation, but, on the contrary, a disposition to increase its rigor, especially in its application to carriers wherever steam is employed as the motive power. Of course, what will be the test of the highest degree of diligence will vary according to the character of the mode of conveyance. That which might be regarded as the utmost care which could be reasonably required of the carrier by stage coach or street car might not be all that would be required of the steam car or the steamboat proprietor, because the same degree of care is not necessary for the safety of the passenger in the conveyance by animal power as when it is "by the dangerous agency of steam." But no matter what the mode of the transportation, the utmost diligence requisite to the safety of the passenger, and compatible with the means employed in his carriage, will be exacted.

at all times, perfectly safe.¹⁴ The requirement of such a degree of care and skill would involve an expenditure and a responsibility so great as to make the business of passenger carriage wholly impracticable, and would drive all prudent men from it. But it does require everything necessary to the security of the passenger, reasonably consistent with the business of the carrier, and appropriate to the means of conveyance employed by him, to be provided, and that the highest degree of practicable care, diligence and skill shall be adopted that is consistent with the mode of transportation used, and that will not render its use impracticable or inefficient for its intended purposes. But to this extent the rule will be rigorously enforced as a protection to the traveler, and as a warning to the carrier against the consequences of delinquency in his duty.¹⁵

Sec. 898. Degree of care required may vary with the circumstances—Duty to warn passenger of danger.—But while the carrier of passengers is under the duty of exercising the highest or utmost degree of care and foresight to provide for the safe conveyance of his passengers, no matter what the means of conveyance employed by him are,¹⁶ nevertheless, in deter-

14. *Indianapolis R. R. v. Horst*, 93 U. S. 291.

15. *Tuller v. Talbot*, 23 Ill. 357; *Pittsburg, etc. R. R. v. Thompson*, 56 *id.* 138; *Dunn v. The Railroad*, 58 Me. 187; *Railway Co. v. Sweet*, 57 Ark. 287, 21 S. W. Rep. 587; *Atkinson v. The Railway*, 90 Mo. App. 489, citing *Hutchinson on Carr.*

Carriers of passengers are not to be held against every possible danger, nor are they to be held accountable for not taking every possible precaution against danger and accident. To so hold them would be to compel them to adopt a course of conduct inconsistent with the economy and speed which are essential to the dispatch of

their business in serving the public. *Libby v. The Railroad*, 85 Me. 34, 26 Atl. Rep. 943, 20 L. R. A. 812.

The carrier of passengers is bound to exercise the highest degree of care and prudence which is consistent with the practical operation of his road and the transaction of his business. *Railway Co. v. Lewis*, 145 Ill. 67, 33 N. E. Rep. 960.

16. A carrier who accepts a passenger upon a car which is crudely built is bound to exercise the same care with regard to such passenger's safety as though he had been accepted upon a Pullman car. *Green v. Pacific Lumber Co.*, 130 Cal. 435, 62 Pac. Rep. 747.

mining in any particular case whether such care and foresight have been used, regard must be had to the means or manner of conveyance. If, for instance, he be a carrier by stage-coach, he is still required to use the utmost care and diligence in providing a reasonably safe conveyance and a skillful and competent driver.¹⁷ Yet, conduct which would be consistent with a due degree of care in the driving of a stage-coach might evince recklessness in the running of a railroad train. So, that which would be gross negligence at one time, or at one stage of a journey might not be so at another. As the bailee of goods may, to some extent, proportion the care which he bestows upon them to their character and value, and that which would be deemed negligence as to one package of goods would not necessarily be so regarded as to another of greater bulk and less value,¹⁸ so the passenger carrier must increase his vigilance when he employs an agent, the careless management of which may be attended with disastrous consequences to his passengers, or when the liability to accidents is increased, by the speed of the carriage, or the difficulties of the highway upon which he travels. And where the circumstances seem to require it, the carrier would owe to his passenger the duty of warning him against danger and of cautioning him against acts of imprudence which endanger his safety.¹⁹ And it has been repeatedly

17. The law imposes upon the proprietor of a stage-coach the duty of providing a reasonably safe conveyance drawn by steady horses, with secure harness, and a skillful and competent driver. In the discharge of this duty, the proprietor is bound to use the utmost care and diligence of cautious persons engaged in the same business to prevent injury to passengers. This does not mean that a stage-coach proprietor warrants the safety of his coach, its equipments, the competency of his driver, or other appliances used, but that he is bound to use the utmost diligence and care in making suitable and safe provision for those whom he carries. *Budd v. United Carriage Co.*, 25 Or. 314, 35 Pac. Rep. 660, 27 L. R. A. 279. See also, *Lewark v. Parkinson*, — Kan. —, 85 Pac. Rep. 601. (Duty as to proprietors of hacks and cabs.)
18. Story on Bail. § 15.
19. The carrier of passengers owes to a passenger the duty of warning him against danger when it is at hand, and of cautioning him against acts of imprudence which may endanger his person whenever the circumstances are

held that carriers of passengers by steamboats and railways will be required to exercise, if possible, even more exact skill, care and diligence than carriers by other modes of conveyance. In the language of Grier, J., in *The Philadelphia & Reading Railroad v. Derby*,²⁰ "when carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.' " And in *Hegeman v. The Railroad Corporation*,²¹ it was said that the degree of precaution, care and skill required of a carrier of passengers by stage-coaches in detecting imperfections in the vehicles used by them is no test of that which should be required of those engaged in transporting persons at a high rate of speed by the agency of steam power upon a railway.²²

Sec. 899. Same subject—When passengers are carried on freight or mixed trains.—"In the operation of freight trains the primary object is the carriage of freight, and the appliances used are, and are known by the passengers to be, adapted to that business; and the carrier is not, when transporting passengers thereon, held to a degree of care in its operation that would destroy the use of the train for its primary purpose. But the law does require that the highest degree of care be exercised that is practicable and consistent with the efficient use of

- such that the safety of the passenger seems to require it. *Romine v. Railroad Co.*, 24 Ind. App. 230, 56 N. E. Rep. 245, citing *Hutchinson on Carr.* See also, *Railway Co. v. Tarin*, 108 Fed. 734, 47 C. C. A. 648, 54 L. R. A. 240; *Rodgers v. Railroad Co.*, — Ark. —, 89 S. W. Rep. 468, 1 L. R. A. (N. S.) 1145; *Tilden v. Rhode Island Co.*, — Rhode Island —, 63 Atl. Rep. 675. 20. 14 How. 468, 486. See also, *The Oregon*, 133 Fed. 609; *Railroad Co. v. Hagblad*, — Neb. —, 101 N. W. Rep. 1033; s. c. 106 N. W. Rep. 1041; *Madden v. Railway Co.*, 50 Mo. App. 666. 21. 13 N. Y. 9. 22. See also, *Carroll v. The Railroad*, 58 N. Y. 126.

the means and appliances adopted; and the carrier must accordingly be held to the same strict accountability for the negligence of its servants injuriously affecting the passengers as it would be if the transportation had been by a train devoted to passenger service exclusively.''²³

Sec. 900. (§ 504.) Risks which the passenger takes upon himself—Carrier not liable for mere accidents or casualties which human prudence could not foresee.—But with whatever stringency the rule is laid down as to the degree of care and vigi-

23. *Railroad v. Arnol*, 144 Ill. 261, 33 N. E. Rep. 204, 19 L. R. A. 313, *affirming* 46 Ill. App. 157; *Ohio, etc. R'y Co. v. Dickerson*, 59 Ind. 317; *St. Louis, etc. R'y Co. v. Valirius*, 56 Ind. 511; *Indianapolis, etc. R'y Co. v. Beaver*, 41 Ind. 493; *Chicago, etc. R. Co. v. Hazzard*, 26 Ill. 373; *Galena, etc. R. Co. v. Fay*, 16 Ill. 558; *Chicago, etc. R. Co. v. Flagg*, 43 Ill. 364; *Illinois, etc. R. Co. v. Sutton*, 53 Ill. 397; *Dunn v. Railway Co.*, 58 Me. 187; *Edgerton v. Railroad Co.*, 39 N. Y. 227; *St. Joseph, etc. R. Co. v. Wheeler*, 35 Kan. 185; *Whitehead v. Railway Co.*, 99 Mo. 263; *McGee v. Railroad Co.*, 92 Mo. 208; *Wagner v. Railroad Co.*, 97 Mo. 512; *Railway Co. v. Irvine*, 64 Tex. 529; *Missouri Pac. R'y Co. v. Holcomb*, 44 Kan. 332, 24 Pac. Rep. 467; *Ohio, etc. R. Co. v. Muhling*, 30 Ill. 9; *Marshall v. Railroad Co.*, 78 Mo. 610; *Logan v. Railroad Co.*, 77 Mo. 668; *Hicks v. Railroad Co.*, 68 Mo. 329; *Portuchek v. Railroad Co.*, 101 Mo. App. 52; 74 S. W. Rep. 368; *Erwin v. Railway Co.*, 94 Mo. App. 289, 68 S. W. Rep. 88; *Green v. Pacific Lumber Co.*, 130 Cal. 435, 62 Pac. Rep. 747; *Railway Co. v. Lippman*, 110 Ga. 665, 36 S. E. Rep. 202, 50 L. R. A. 673; *Railway v. Cunningham*, 123 Ga. 90, 50 S. E. Rep. 979; *Stoody v. Railway Co.*, 124 Mich. 420, 83 N. W. Rep. 26; *Simmons v. Railroad Co.*, 41 Ore. 151, 69 Pac. Rep. 440, 1022; *Steele v. Railway Co.*, 55 S. Car. 389, 33 S. E. Rep. 509, 74 Am. St. Rep. 756; *Railway Co. v. Lauricella*, (Tex. Civ. App.) 26 S. W. Rep. 301; *Hardin v. Railway Co.*, (Tex. Civ. App.) 77 S. W. Rep. 431; *Railway Co. v. Rogers*, 24 Tex. Civ. App. 382, 60 S. W. Rep. 61; *Railway Co. v. Dawson*, 98 Va. 577, 36 S. E. Rep. 996; *Fisher v. Railroad Co.*, 89 Cal. 399, 26 Pac. Rep. 894; *Railroad Co. v. Huggins*, 89 Ga. 494, 15 S. E. Rep. 848; *Railroad Co. v. Best*, 169 Ill. 301, 48 N. E. Rep. 684, *reversing* 68 Ill. App. 532; *Railroad Co. v. Winters*, 175 Ill. 293, 51 N. E. Rep. 901, *affirming* 65 Ill. App. 435; *Railroad Co. v. Axley*, 47 Ill. App. 307; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. Rep. 860; *Railway Co. v. Jordan*, 25 Ky. L. R. 574, 76 S. W. Rep. 145; *Railroad Co. v. Bell*, 100 Ky. 203, 38 S. W. Rep. 3; *Railway Co. v. Adams*, 32 Tex. Civ. App. 112, 72 S. W. Rep. 81; *Sprague v. Railway Co.*, 92 Fed. 59, 34 C. C. A. 207.

lance which the carrier must use for the security of his passenger, there are still, so long as he is not a warrantor of his safety, which he can only become by contract, certain risks which are incurred by the passenger, and for which the carrier is not responsible. These are the casualties which human sagacity cannot foresee, and against which the utmost prudence cannot guard. When he travels upon a ship, whether navigated by sails or by steam, or in a coach or railroad car, or upon any public conveyance, he expects to take, and does take, upon himself the hazards of such accidents as may accrue to him without any want of care or diligence on the part of the carrier. The risk of these the passenger must take upon himself. As said by the learned judge in *McKinney v. Neil*:²⁴ "We are surrounded with dangers at home and abroad, and they are greater when we travel than while we remain stationary. In some modes of traveling these dangers are greater than in others. They may be greater on water than on land; on a fast line of stages than on a slow one. And every passenger must make up his mind to meet the risks incident to the mode of travel he adopts, which cannot be avoided by the utmost degree of care and skill in the preparation and management of the means of conveyance. This is the only guaranty given by the proprietor of the line."²⁵ Thus in *The Transportation*

24. 1 McLean, 540.

25. Where a passenger knowingly accepts carriage over a new road not yet open for traffic and over which passenger trains are not yet running, he must be deemed to accept the risks incident to riding upon such a road. *San Antonio, etc. R'y Co. v. Robinson*, 79 Tex. 608, 15 S. W. Rep. 584.

The carrier is not liable where a passenger, without fault of the carrier, walks off a car platform while the car is not in motion (*Railroad Co. v. Trotter*, 60 Miss. 442); nor where a passenger is

injured by the carrier's servant who accidentally falls against him (*Skinner v. Railroad Co.*, 39 Fed. Rep. 188); nor where a passenger accidentally stumbles over the sheathing covering the wheels of an open street car. *Farley v. Traction Co.*, 132 Penn. St. 58.

The carrier is not liable for the act of a passenger, who, in raising a car-window for the comfort of a female passenger, fails to raise it to a sufficient height which causes it to suddenly fall on the female passenger's hand. *Dumas v. The Railway*, (Tex. Civ. App.) 43 S. W. Rep. 908.

Company v. Harper,²⁶ it appeared that the defendant's steamboat, while passing the pier of a drawbridge, struck against the pier, and that the collision caused a number of negro passengers on board to become panic-stricken. In the stampede which followed, the plaintiff, who was one of the negro passengers, was run down and trampled upon in such manner as to cause him to be permanently injured. It was decided that there was nothing in the act of the defendant's servants that would naturally and ordinarily give rise to the stampeding of a crowd of passengers, and that, since the defendant could not reasonably be required to anticipate that on account of such an occurrence a number of negroes would become panic-stricken and run down and trample upon one of their number, it was not liable for the injury.

Sec. 901. Same subject.—In *Cleveland v. Steamboat Co.*,²⁷ which was a case several times before the court, it appeared that the plaintiff was a passenger on board defendant's steamboat. Just as the boat was leaving the dock and as the gangway was being replaced and the gates closed, a man on board started to leave the boat and jumped into the water. The cry of "man overboard" was raised and the other passengers rushed to that side of the boat, and in the rush plaintiff was crowded overboard into the water, through the gateway which had not yet been closed. On the last appeal the court, by Peckham, J., said: "To say that the boat should not have been

So the carrier will not be liable where a passenger, in jumping on a moving train, accidentally comes in contact with the porter which causes him to fall from the train. *Garmean v. The Railroad*, 109 Ill. App. 169.

In *Craighead v. The Railroad*, 123 N. Y. 391, 25 N. E. Rep. 387, the carrier was held not liable where a passenger, riding upon the step of an open street car, was knocked off by a passing car and injured. The negligence com-

plained of was in not having more space between the tracks, but it appearing that the same space had been adopted for more than twenty years and that thousands of passengers had ridden in the same location without injury, the court held to be an accident not reasonably to be apprehended.

26. 118 Ga. 672, 45 S. E. Rep. 458.

27. 86 N. Y. 306, 89 N. Y. 627, 125 N. Y. 299.

allowed to move a foot from the dock until this gate had been securely fastened and the rail and stanchions placed in position is to decide the matter in view of the facts which subsequently occurred and not from the circumstances existing prior thereto. It was an accident which could not, as I think, have been reasonably anticipated. The attempt of a belated man to jump from the boat to the wharf immediately after the starting of the boat, his failure to reach the dock and his consequent falling into the water, the cry of 'man overboard,' the instantaneous rush of a crowd of ordinary passengers towards the side of the boat whence the cry proceeded, and the shoving of the plaintiff overboard, altogether form such an extraordinary and therefore unheard of combination of circumstances that the failure to foresee their possibility and to guard against their happening cannot in any fair or proper view of the subject be called negligence."

2. *Duty as to means of conveyance.*

Sec. 902. (§ 505.) Carrier's responsibility for the safety of his means of conveyance.—It is the duty of all public carriers, whether carriers of goods or passengers, or both, to provide themselves with suitable and sufficient means to carry according to their professions; and so far as they undertake, as common carriers of goods, their obligation, unless modified by contract, is absolute that the vehicles or other means by which the transportation is effected shall be faultless. They warrant the safety of the goods, in other words, against all imperfections, known or unknown, hidden or patent, in the instruments by which they undertake to make the conveyance, and no excuse will be heard from them that the loss or injury was occasioned by such imperfections, no matter to what attributable, unless it be the act of God or of the public enemy, the fault of the shipper himself, or some inherent defect in the goods. The safety or sufficiency, therefore, of means of transportation employed by the carrier of goods is a matter of more concern to the carrier himself than to the owner of the goods, unless the

carrier has, by contract, protected himself against such risks. But when the passenger intrusts himself to the carrier, it becomes a matter of vital concern to him that the vehicle by which he is to be carried shall be safe in every particular so far as it can be made so by human skill. As the liability of the carrier to the passenger depends entirely upon the question of negligence and not upon any warranty of safety as in the case of goods, the only legitimate inquiry, when he has sustained an injury from the insecurity or imperfection of the means by which he is being carried, is whether the carrier has exercised that degree of care and diligence which the law requires of him, and the inquiry into such care and diligence must, of course, be extended to the instrument or means by which the carrier has undertaken to transport him. If this should be shown to have been unsafe or insufficient from palpable or easily discovered imperfections, there could be no doubt that the carrier had been guilty of culpable negligence which would make him liable to the passenger. But if such defects were unknown to the carrier, and could not have been discovered without a skillful inspection, would the carrier be chargeable with negligence? And if so, what degree of skill must be applied or required in the examination, without a discovery of the defect, in order to exonerate him from the charge?

Sec. 903. (§ 506.) Same subject—Liability for latent defects.

—It is admitted on all hands that the carrier does not warrant the safety of the passenger. The reasons for this are plain and have already been stated. The question, however, whether he warrants the perfection of his vehicle and its appointments has been sometimes regarded in a different light, and the answer to it depends, by no means, upon the same reasons. Many cases have turned upon its decision. In *Ingalls v. Bills*¹ the injury arose from a hidden defect, which could not be discovered by the most careful and thorough examination, being a small flaw in

1. 9 Met. 1.

In *Palmer v. Canal Co.*, 120 N. Y. 170, it is said: "While a rail-

road company is not an insurer of the safety of its passengers, it is bound to use a high degree of skill

the interior of an iron axletree of a stage-coach, which was entirely surrounded by sound iron. Hubbard, J., after a very thorough and able review of the English cases which were supposed to throw light upon the subject, announced that the conclusion to which the court had come was "that carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient and suitable coaches, harnesses, horses and coachmen, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense."

and vigilance to guard against accidents which may be attended with injurious consequences to them. This duty is not discharged without the utmost care and diligence which human prudence and foresight will suggest to secure the safety of its passengers. And this vigilance is to be exercised by the company to see that its road, and appliances used in operating it, are and remain in good condition and free from defects; *and a latent defect which will relieve it from responsibility is such only as no reasonable degree of human skill and foresight could*

guard against. Hegeman v. Western R. R. Co., 13 N. Y. 9; Bowen v. N. Y. C. R. R. Co., 18 *id.* 408; Brown v. N. Y. C. R. R. Co., 34 *id.* 404; Caldwell v. N. J. S. Co., 47 *id.* 282; Penn. Co. v. Roy, 102 U. S. 451. This measure of responsibility is deemed essential to the proper protection of passengers, who must necessarily rely wholly upon the precautionary care and diligence of the carrier so far as their safety depends upon the condition of the road and the means provided for their conveyance."

See, also, Wynn v. Railroad Co., 14 N. Y. Suppl. 172.

Sec. 904. (§ 507.) Same subject.—This may be considered the leading American case upon the question of the extent of the liability of the passenger carrier for latent defects in his vehicles, and the measure of his liability therefor as thus defined is now almost universally adopted,² and applied to carriers of passengers by all kinds of vessels and vehicles, whether propelled by steam power or not.³

Sec. 905. (§ 508.) Same subject—The English rule.—In the English courts, the same question continued without a satisfactory determination until the case of *Readhead v. The Midland Railway Company*.⁴ In this case it was proven that the accident from which the injury resulted to the passenger had been caused by the giving way of one of the wheels of the car in which he was being carried, owing to a defect in the

2. *Frink v. Potter*, 17 Ill. 406; *Galena, etc. R. R. v. Fay*, 16 *id.* 558; *Mobile, etc. R. R. v. Thomas*, 42 Ala. 672; *Sawyer v. Railroad*, 37 Mo. 240; *Edwards v. Lord*, 49 Me. 279; *Derwort v. Loomer*, 21 Conn. 245; *Hall v. Steamboat Co.*, 13 *id.* 319; *McKinney v. Neil*, 1 McLean, 540; *The Netherlands*, 14 Phila. 601; *Anthony v. Railroad Co.*, 27 Fed. Rep. 724; *Carter v. Railway Co.*, 42 Fed. Rep. 37; *Maury v. Talmadge*, 2 McLean, 157; *Peck v. Neil*, 3 *id.* 22; *Farish v. Reigle*, 11 Gratt. 697; *Stockton v. Frey*, 4 Gill, 406; *Frink v. Coe*, 4 G. Greene (Iowa), 555; *Curtiss v. The Railroad*, 20 Barb. 282; *Holbrook v. The Railroad*, 16 *id.* 113; *Palmer v. Canal Co.*, 120 N. Y. 170; *Railroad Co. v. Sheppard*, 56 Ohio St. 68, 46 N. E. Rep. 61, 60 Am. St. Rep. 732; *Buckland v. The Railroad*, 181 Mass. 3, 62 N. E. Rep. 955.

3. In *Alden v. The Railroad*, 26 N. Y. 102, it was, however, decided by the court of appeals of

New York, that the carrier is bound, absolutely and irrespective of negligence, to provide road-worthy vehicles, and that he was liable to the passenger for injuries received by him from the breaking of an axle of a car, although the defect could not have been discovered by any practicable mode of examination; and the case of *Sharp v. Grey*, 9 Bing. 457, was relied upon as fully sustaining the position. But the rule as thus laid down is said, in the subsequent case of *McPadden v. The Railroad*, 44 N. Y. 478, in the same court, to have been a departure from every prior decision or authority to be found in the books; and in the still more recent case of *Carroll v. The Railroad*, 58 N. Y. 136, it is said that "subsequent cases show that it was not the intention of the court, in that case, to depart from the established doctrine on the subject."

4. L. R. 2 Q. B. 412, L. R. 4 Q. B. 379.

welding of the tire, caused by an air bubble; that the defect was not discoverable by the eye or the ear; that the wheels were examined during the journey in the usual way, by inspection and sounding them with a hammer, which failed to reveal the defect; that the tire of the wheel in question was of the usual thickness; and that such defects might exist without any fault on the part of the manufacturer. The judge before whom the cause first came instructed the jury that if the defect in the wheel was one which could not be detected, either by the eye or the ear, there was no negligence on the part of the carrier; and the jury found for the defendant. The cause was taken to the court of queen's bench, in which it was held that upon these facts the plaintiff could not recover.⁵ On this

5. In this court, Blackburn, J., did not entirely concur with the other judges in regard to the extent of the obligation of the carrier to provide vehicles absolutely safe, though he did not dissent from the judgment of the court. The concluding portion of his opinion is as follows:

"I have only to add that I do not think that the duty to supply a seaworthy ship or a sufficient vehicle by land is equivalent to a duty to supply one perfect, and such as never can, without some extraordinary peril, break down; which would have the effect of making the carrier an insurer against all losses arising from any failure in the vehicle, which cannot be shown to arise from some unusual accident.

"I had occasion in *Burges v. Wickham*, 3 B. & S. 669, 693 (E. C. L. R. vol. 113), to consider what was the meaning of the term 'seaworthy,' as applied to a ship; and I see no reason to change the opinion which I then expressed, that it meant no more

than that degree of fitness which it would be usual and prudent to require at the commencement of the adventure; and applying a similar principle to a land journey, I agree with what I understand to have been the direction of Erle, C. J., in *Ford v. London & Southwestern Railway Company*, 2 F. & F. 730, that the railway company are not bound to have a carriage made in the best of all possible ways, but sufficiently fulfilled their duty by providing a carriage such as was found in practical use to be sufficient. In other words, I understand the obligation to be, to furnish, not a perfect vehicle, but one reasonably sufficient. But in the present case the carriage was not such as to be reasonably sufficient. Had the parties who sent it out known of the existence of this defect in the tire, there would have been strong ground for accusing them of manslaughter, if death had ensued. They did not know it, and could not discover it until the tire broke; and they are therefore free from

judgment, error was brought to the court of exchequer chamber, in which the case was carefully considered. A number of English cases were cited and relied upon for the plaintiff, and especially that of *Sharp v. Grey*,⁶ which it was urged had settled the law in England in favor of the absolute liability of the passenger carrier for a defect in his vehicle, whether known or discoverable or not, and which had governed at least one of the decisions of the highest court of New York, to the same effect.⁷ But the court, after a critical and thorough review of all the cases, somewhat in the same manner in which it had been made by Hubbard, J., in *Ingalls v. Bills*, nearly twenty years before, arrived at the same conclusion and settled the law upon this question for England in the same manner in which it had been held by the majority of the American courts. The established law in both countries may, therefore, be now stated to be that, while a carrier of passengers is bound to use the utmost care and skill in everything that concerns the safety of the passenger, he will not be responsible for injuries arising from latent defects in his vehicles or machinery, which no human care or skill could have either detected or prevented; or in other words, that, while it is his duty to apply every known and practicable test for the discovery of defects and imperfections in the vehicles and machinery which he employs for the transportation of passengers, he does not warrant that they are free from such defects and imperfections, and if it appear that such defects actually existed, but were undiscov-

all moral blame or criminal responsibility. The question is, therefore, distinctly raised, whether the obligation of the carrier of passengers to the passenger is merely to take every precaution to procure a vehicle reasonably sufficient for the service, whether by sea or by land, in which case the direction was right; or whether it is, as I think, an absolute obligation, at his peril, to

supply one, or be responsible for any damage resulting from a defect.

"Taking the view of the law which I do, I think the rule for a new trial ought to be made absolute; but the majority of the court being of a different opinion, it must be discharged."

6. 9 Bing. 457.

7. *Alden v. The Railroad*, 26 N. Y. 102.

erable by such tests, he will not be held liable to the passenger for an injury which may result from them.

Sec. 906. (§ 509.) Responsibility for defects in vehicles and machinery attributable to the fault of the manufacturer.—The question has been raised whether the carrier is responsible for defects in his vehicle which are attributable to the fault of the manufacturer, and which might have been discovered by him by the application of tests known to skilful manufacturers, and which should have been applied by him before turning out the vehicle to the carrier. This question was long since answered in the affirmative by the court of appeals of New York. In *Hegeman v. The Railroad*,⁸ the plaintiff, when traveling on the road of the company, had received an injury, occasioned by the breaking of an axle of the car, which, it appeared, was cracked when it left the hands of the manufacturer. The defect was, however, invisible, and could not have been discovered by the company by the application of the usual tests employed by such companies, but could have been discovered by the manufacturer by the application of a simple and well known test used by such manufacturers. The question was, whether the carrier should be held liable for the consequences of the failure, on the part of the manufacturer, to apply this test, which would have revealed this defect and led to its remedy, and it was held that, for this omission of the manufacturer, the company became responsible, and that the plaintiff was entitled to recover.⁹ “It is perfectly understood,” said Gardiner, C. J., who delivered the opinion of the court, “that latent defects may exist, undiscoverable by the most vigilant examination when the fabric is completed, from which the most serious accidents have and may occur. It is also well known, as the evidence in this suit tended to prove, and the jury have found, that a simple test (that of bending the iron after the axle was formed, and before it was connected with the wheel) existed, by which it could be detected. This should

8. 13 N. Y. 9.

9. Marvin and Denio, J. J., dissenting.

have been known and applied by men 'professing skill in that particular business.' It was not known, or, if known, was not applied by these manufacturers. It was not used by the defendants, nor did they inquire whether it had been used by the builders. They relied upon an external examination, which they were bound to know would not, however faithfully prosecuted, guard their passengers against the danger arising from concealed defects in the iron of the axles, or in the manufacture of them. For this omission of duty, or want of skill, the learned judge held, and I think correctly, that they were liable." And this rule of responsibility on the part of the carrier for the unskilfulness or negligence of the manufacturer of the vehicles or machinery which he employs in the carriage of passengers has been treated in subsequent cases as the established law in that state.¹⁰ But whether the rule would be applied to conveyances propelled by other agencies than steam is left uncertain.

Sec. 907. (§ 510.) Same subject.—The same view of the question was taken, and the same rule was applied, by the supreme court of Tennessee, in the case of *The Nashville & Chattanooga Railroad v. Elliott*,¹¹ in which the judge below, having instructed the jury that the railway company was bound to see to it that their engines and machinery were perfect and properly constructed according to the present state of the art, it was held that there was no error. "The general doctrine," said McKinney, J., "is that in proportion to the importance of the business and the perils incident to it, is the obligation of the company to see that the engines and apparatus are suitable, sufficient, and 'as safe as care and skill can make them.'"

Sec. 908. (§ 511.) Same subject.—But the subject was subsequently examined by Nicholson, C. J., in the case of *The Nashville & Decatur Railroad v. Jones*,¹² and the law as appli-

10. *Caldwell v. The Steamboat Company*, 47 N. Y. 282; *Carroll v. The Railroad*, 58 N. Y. 126.

11. 1 Cold. 611.

12. 9 Heisk. 27.

cable to the railway carrier of passengers was thus stated, overruling the preceding case upon this point: "The legitimate obligation imposed upon the company by its contract with a passenger or employee is, that its engine and apparatus are then suitable, sufficient, and as safe as care and skill can make them, and that the company will be responsible for any injury resulting from defects therein which might have been discovered by the company or its agents, by the proper care and skill in the application of the ordinary and approved tests. If the defects are such that they could not be discovered by the company or its agents after a careful and skilful application of the ordinary and approved tests, then the company cannot be held responsible, although it may appear that the defects might have been discovered by the manufacturers by applying the proper tests. We hold it unreasonable to assume that the company not only contracts to be responsible for its own negligence, but also for that of the manufacturers."

Sec. 909. (§ 512.) Same subject—Carrier responsible to passenger for negligence of manufacturer.—But notwithstanding what may be said in some of the cases, the better opinion and the decided weight of authority is in favor of the position that, so far as the passenger is concerned, the carrier is responsible for the negligence of the manufacturer. The passenger pays for his carriage in a safe vehicle; and it is not only the duty of the carrier to employ skilful and careful manufacturers of such vehicles and machinery as he proposes to use, but even when he has done this, if it should appear that such manufacturers have been negligent and have failed to apply such tests as prudence would dictate to ascertain the soundness of their work, and if an injury result from a defect which might have been discovered by such tests, the passenger may claim compensation from the carrier, who in his turn must resort for indemnity to the manufacturer. The carrier would certainly be liable for the negligence if he were his own manufacturer, and if he employs another to manufacture for him, that other becomes his employe for the purpose, and the rule of

respondeat superior applies, as it does in many such cases, not concerning the carrier, but depending upon the same principle. As where one causes a building to be erected, into which he invites the public to come to witness an exhibition, for which he requires them to pay, and the building falls and injures those who are in it, from some defect which might have been seen or discovered and remedied by due care on the part of the builder, the owner is liable, because the implied contract in such a case is that of a warranty, not only of due care on the part of himself and his servants, but also of due care on the part of the contractor who constructed the building; and whether the owner himself knew or could have known of any defect in the building can make no difference. Such was the case of *Francis v. Cockrell*,¹³ where the defendant had erected a grandstand to enable persons who paid for seats to witness a steeplechase. The stand fell and injured the plaintiff; and although it was shown that the defendant had employed a competent builder, and was not himself aware of any defect in the stand, he was held liable for the injury. And the learned judge, in likening the case of the defendant to that of the carrier of passengers, used the following language: "In the ordinary course of things, the passenger does not know whether the carrier has himself manufactured his means of conveyance or has employed some one else for its manufacture. If the carrier has contracted with some one else, the passenger does not usually know who that person is, and in no case has he any share in the selection. The liability of the manufacturer must depend on the terms of the contract between him and the carrier, of which the passenger has no knowledge and over which he can have no control, while the carrier can introduce what stipulations and take what securities he may think proper. For the injury resulting to the carrier himself by the manufacturer's want of care the carrier has a remedy against the manufacturer; but the passenger has no remedy against the manufacturer for damage arising from a mere breach of con-

13. L. R. 5 Q. B. 184.

tract with the carrier.¹⁴ Unless, therefore, the presumed intention of the parties be that the passenger should, in the event of his being injured by the breach of the manufacturer's contract, of which he has no knowledge, be without remedy, the only way in which effect can be given to a different intention is by supposing that the carrier is to be responsible to the passenger, and to look for his indemnity to the person whom he selected and whose breach of contract has caused the mischief." And this view of the carrier's liability for the carelessness of the manufacturer is sustained by a number of cases, both English and American.¹⁵

Sec. 910. (§ 512a.) Same subject—Same rule applies to bridges.—The same rule applies also to the railway carrier's responsibility for the bridges constructed or caused to be constructed by it along its line of road. If a passenger sustains injury by reason of a defective bridge, the railway company can only relieve itself by showing that it exercised the highest practicable degree of care and skill in making the bridge reasonably safe for its intended purpose, and that, to the fullest extent that such care and skill would suggest, the bridge was inspected from time to time for the purpose of discovering and remedying any defects that might have developed in it from the operation of the road or otherwise.¹⁶ And if an injury result

14. *Longmeid v. Holliday*, 6 R. 2 Q. B. 412, L. R. 4 Q. B. 379; Exch. 761.

15. *Caldwell v. The Steamboat Co.*, 56 Barb. 425, 47 N. Y. 282; *Hegeman v. The R. R. Corporation*, 13 N. Y. 9; *McPadden v. The Railroad*, 44 N. Y. 478; *Bissell v. The Railroad*, 25 *id.* 442; *Curtis v. The Railroad*, 18 *id.* 534; *Carroll v. The Railroad*, 58 *id.* 126; *Grote v. The Railway Co.*, 2 Exch. 251; *Pym v. The Railway*, 2 Foster & Finlason, 619; *Brazier v. The Polytechnic Institution*, 1 *id.* 507; *Pike v. The Polytechnic Institution*, *id.* 712; *Readhead v. The Railway*, L. R. 2 Q. B. 412, L. R. 4 Q. B. 379; *McGuire v. The Golden Gate*, 1 McAllister, 104; *Gillenwater v. The Railroad*, 5 Ind. 340; *Meier v. The Railroad*, 64 Penn. St. 225; *Manser v. The Railway Co.*, 3 L. T. (N. S.) 585; *Pittsburg, etc. R. R. v. Nelson*, 51 Ind. 150; *Illinois Cent. R. R. v. Phillips*, 49 Ill. 234; *Pendleton v. Kinsley*, 3 Clifford, 416; *Toledo, etc. R'y Co. v. Beggs*, 85 Ill. 80.

16. *Jackson v. The Railway*, 144 La. 982, 38 So. Rep. 701, 70 L. R. A. 294.

from a defect which the railway company alleges was latent, and therefore such as a careful inspection would not disclose, it will not be enough for the company to show that it contracted with and obtained the materials from a reputable manufacturer.¹⁷ To relieve itself from liability, it must further show that the materials were carefully and skilfully tested in accordance with the usual and approved methods commonly employed in testing materials of that character, and that no defects were discovered.¹⁸ "The duty of a railroad company engaged in carrying passengers," said the court in *The Railway Company v. Snyder*,¹⁹ "is not always discharged by purchasing from reputable manufacturers the iron rods or other iron work used in the construction of its bridges. The duty of the company is not discharged by trusting, without inspecting and testing, to the reputation of the manufacturers and the external appearance of such materials. The law requires that before the lives of passengers are trusted to the safety of its bridges, the company shall carefully and skilfully test and inspect the materials it uses in such structures. This duty of inspection does not end when the materials are put in place, but continues during their use, for the company is bound to test them from time to time to ascertain whether they are being impaired by use or exposure to the elements."

Sec. 911. Responsibility for equipping vehicles with unsafe appliances—Duty as to management of appliances.—Having provided vehicles which in themselves are as safe for their intended purpose as human skill and foresight can reasonably

17. *Grote v. The Railway*, 2 P. 486, 1 C. P. Div. 342; *Ingalls v. Bills*, 9 Metc. 1; *Funk v. Potter*, 17 Ill. 406; *Bremner v. Williams*, 1 Car. & P. 414; *Hegeman v. Railroad Co.*, 13 N. Y. 9; *Alden v. Railroad Co.*, 26 N. Y. 102.

18. *Jackson v. The Railway*, *supra*, citing *Hutchinson on Carr.*

19. 117 Ind. 425, citing (as illustrative of the principle) *Manser v. Railway Co.*, 3 L. T. (N. S.) 585; *Texas, etc. R'y Co. v. Suggs*, 62 Tex. 323; *Stokes v. Railway Co.*, 2 F. & F. 691; *Robinson v. Railroad Co.*, 9 Fed. Rep. 877; *Richardson v. Railway Co.*, L. R. 10 C. As to defective culverts, see *Libby v. The Railroad*, 85 Me. 34, 26 Atl. Rep. 943, 20 L. R. A. 812; *Railroad Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. Rep. 202.

make them, it is the carrier's duty to exercise the utmost care and caution in keeping the various appliances with which such vehicles are equipped in a safe and suitable condition; and if by reason of an appliance being unsafe or defective an injury is sustained by the passenger, the carrier will be responsible if by the exercise of such care and caution he ought to have foreseen that such an injury was likely to happen. If, for instance, he allows a seat in one of his vehicles to become so defective that it falls,²⁰ or if he fails to exercise a due degree of care in keeping the fastening on a vehicle window in a safe condition, and the window, which has been raised, suddenly closes,²¹ or if he permits a door of such unusual construction as to be more than ordinarily dangerous to remain in use upon a vehicle,²² or if he makes use of a particular pattern of platform upon which there is attached a coupling pin which projects beyond the platform in such a manner that it is likely to catch the attire of female passengers,²³ or if he neglects to use a due de-

20. *International, etc. R. Co. v. Anthony*, 24 Tex. Civ. App. 9, 57 S. W. Rep. 897. *nell*, 160 Ill. 636, 43 N. E. Rep. 704, *affirming s. c.* 59 Ill. App. 463.

21 *Gulf, etc. R'y Co. v. Killebrew*, (Tex.) 20 S. W. Rep. 1005; *s. c.* 20 S. W. Rep. 182.

22. *Sturdivant v. Railway Co.*, (Tex. Civ. App.) 27 S. W. Rep. 170.

But a railroad company is not negligent in failing to furnish doors for its passenger cars which are provided with glass so that passengers in leaving the cars may be able to see through them and thereby be warned against danger from the doors being suddenly pushed open by incoming passengers. It is enough that such doors are of the kind in common use. *Graeff v. The Railroad*, 161 Penn. St. 230, 28 Atl. Rep. 1107, 41 Am. St. Rep. 885, 23 L. R. A. 606.

23. *Illinois, etc. R. Co. v. O'Con-*

In Poulin v. The Railroad, 34 N. Y. Sup. Ct. 296, the accident was occasioned by the hoop-skirt worn by the plaintiff catching upon a projecting nail upon the platform of the car, which caused her to be dragged some distance upon the street and injured. The court at the trial had told the jury that "if hoop-skirts are worn by such passengers as the railroad were in the habit of carrying, it was bound to provide for the safety of passengers with that kind of garment on;" and this instruction was approved by the appellate court and the company was made liable for the injury.

The case of *Delamaty v. The Railroad Company*, 24 Wis. 578, was also that of injury to the passenger by the catching of her

gree of care in keeping the berths in his vehicles properly secured in place, and an upper berth falls upon a lower one,²⁴ or if he permits a halyard used in hoisting a heavy lantern on his vessel to become defective, and the halyard breaks causing the lantern to fall,²⁵ or if he constructs ladders on the ends of his freight cars instead of on the outside without providing bumpers or other agencies to keep the cars from coming so close together as to imperil the lives of persons lawfully using such ladders,²⁶ or if he starts on a journey with an engine which is known to be out of repair,²⁷ and an injury results to a passenger, he will be liable.

So it is the duty of the carrier to exercise a high degree of care and foresight in so managing the appliances with which his vehicles are equipped that injury to passengers may be avoided. Thus, if he leaves the iron flanges on a car platform

dress upon the steps of the car as she attempted to alight from it; and the company was held liable upon the ground that it had provided no means for enabling passengers dressed in female attire to descend from its cars without the risk of such accidents.

In *Kelly v. Railway Co.*, 39 Hun, 486, the passenger's dress caught on an unguarded hook and the carrier was held liable; but this was reversed in the court of appeals. 109 N. Y. 44.

It will be noticed that most of the cases against railway companies for injuries sustained in alighting from their cars in consequence of insufficient facilities provided for that purpose have been brought on behalf of female passengers, who, as said in *Robson v. The Railway Co.*, L. R. 10 Q. B. 271, from their mode of dress and habits of life are but ill suited to grapple with the difficulties of such situations.

But the use of a car with three steps instead of four steps, the lowest step being about eight inches farther from the ground than the lowest step on a car with four steps, such car with three steps being in common use, is not negligence. *Crowe v. Railroad Co.*, — Mich. —, 106 N. W. Rep. 395.

24. *Horn v. New Jersey Steamboat Co.*, 48 N. Y. Supp. 348, 23 App. Div. 302.

25. *The Wasco*, 53 Fed. 546.

Where a carrier by steamboat uses a defective appliance for the purpose of bringing his boat to the dock, and the appliance gives way and injures a passenger, he will be liable. *Miller v. Steamship Co.*, 118 N. Y. 199.

26. *Railroad Co. v. Blumenthal*, 57 Ill. App. 538; s. c. 160 Ill. 40, 43 N. E. Rep. 809.

27. *Railway Co. v. Heath*, 22 Ind. App. 47, 53 N. E. Rep. 198.

standing in an upright position while passengers are in the act of leaving the car,²⁸ or if he neglects to keep the openings in the deck of his vessel near which passengers are in the habit of passing securely closed or else properly guarded²⁹ and a passenger is thereby injured, he will be responsible for the injury thus caused.

Sec. 912. Responsibility for injuries caused by escaping sparks or cinders.—If the carrier employ steam as a motive power, it is his duty to equip his engines or locomotives with spark-arresters, or other efficient appliances, for the purpose of protecting his passengers from injuries by escaping sparks or cinders. He is not, however, required to provide appliances which will prevent absolutely the escape of sparks or cinders, or even appliances of the best type known to be in existence if their use would not be practicable. But he is required to provide appliances for the purpose which are of the best approved type in general use by other persons engaged in a similar occupation.³⁰ And having provided such appliances, it is his duty to exercise a high degree of care in keeping them in suitable repair and efficient for their intended purpose, and for any negligence in discharging such duty whereby a passenger sustains an injury, he will be liable.³¹

28. *Railroad Co. v. Gates*, 162 Ill. 98, 44 N. E. Rep. 1118, *affirming* 61 Ill. App. 211.

29. *Memphis, etc. Packet Co. v. Buckner*, 22 Ky. Law Rep. 401, 57 S. W. Rep. 482; *The City of Kingston*, 77 Fed. Rep. 655.

30. *Texas, etc. R. Co. v. Jumper*, 24 Tex. Civ. App. 671, 60 S. W. Rep. 797; *St. Louis, etc. R'y Co. v. Parks*, 7 Tex. Ct. Rep. 178; *s. c.* 8 Tex. Ct. Rep. 452, 73 S. W. Rep. 439; *Railway Co. v. Parks*, 97 Tex. 131, 76 S. W. Rep. 740, *reversing s. c.* (Tex. Civ. App.) 69 S. W. Rep. 125; *Missouri, etc. R'y Co. v. Mitchell*, (Tex. Civ. App.) 79 S. W. Rep. 94; *Missouri, etc. R'y*

Co. v. Flood, — Tex. Civ. App. —, 79 S. W. Rep. 1106; *Railway Co. v. Young*, 90 Fed. 709, 33 C. C. A. 251. Where a passenger's eye was injured by a spark from a locomotive and it appeared that the locomotive was in good repair and equipped with the best known appliance for preventing the escape of sparks, that the engineer was both competent and skilful and that the engine was properly and skilfully managed and operated at the time of the injury, it was held that the passenger was without remedy. *Railway Co. v. Orton*, 67 Kan. 848, 73 Pac. Rep. 63.

31. See cases cited in preceding

Sec. 913. Liability of carrier where the immediate cause of the injury is the negligent act of a third person.—In an action by the passenger to recover damages for an injury suffered, it will be no excuse to the carrier that the immediate cause of the injury was the negligent act of some third person, between whom and the carrier no relation whatever existed, if his own negligence in any degree concurred in bringing the injury about. The carrier is under the duty of protecting the passenger from all dangers which are known, or which by the exercise of a high degree of care and foresight ought to be known, whether occasioned by himself or by another for whose conduct he is in no manner responsible. If, therefore, the immediate cause of the injury was the negligent act of some third person, and such act, by the exercise of a due degree of care and foresight ought to have been foreseen by the carrier, his omission to provide against it will be actionable negligence, and either or both of the wrong-doers can be held responsible.³² Thus where a boy, while playing about a

note. See also, *St. Louis, etc. R'y Co. v. Parks*, — Tex. Civ. App. —, 90 S. W. Rep. 343.

32. In *Clerc v. The Railroad*, 107 La. 370, 31 So. Rep. 886, 90 Am. St. Rep. 319, it appeared that the carrier had placed a freight car upon a switch for the purpose of being unloaded by the consignee. The car was placed so near the main track that if the door of the car were to be thrown open it would close the intervening space between the main track and the switch and thus make a collision between the door and passing trains probable. In unloading the car, the consignee threw the door open and soon afterwards it struck against the side of a passenger train which was passing on the main track, causing injury to a passenger. It was held that al-

though the consignee had carelessly thrown the door open so as to come in contact with passing trains, the carrier was nevertheless responsible for its negligence in placing the car in a position where it ought to have foreseen that such an accident might happen, and that the negligence of the consignee was no excuse.

In *Dufur v. The Railroad*, 75 Vt. 165, 53 Atl. Rep. 1068, the plaintiff, while a passenger in one of the defendant's passenger cars, which had been temporarily placed upon a side track, was accidentally injured by a bullet from the firearm of a person who was standing near the side track shooting at a target. The court, in its opinion, said: "If the defendant ought to have foreseen that such an accident might hap-

passenger car in which a passenger was sitting, loosened the brake on the car, and in consequence the car ran swiftly over a down grade causing injury to the passenger, it was held that although the loosening of the brake was the act of a trespasser, the carrier was nevertheless responsible for having omitted to use sufficient means to keep the car properly secured.³³ And where the plaintiff, while passing over the gang-plank of the defendant's boat, was precipitated into the water and injured by the giving way of the gang-plank, and it appeared that the negligent operation of another boat which was tying to the boat from which the plaintiff was departing caused the gang-plank to fall, it was held that although the negligence of a stranger was the immediate cause of the plaintiff's injury, such negligence was no excuse to the defendant where it had failed to have the gang-plank properly secured.³⁴ So where the immediate cause of an injury to the passenger is an act of God, the carrier will not be excused if his negligence has concurred in any degree in causing the injury.³⁵

Sec. 914. Liability of carrier where injury is due to an intervening cause.—The principle is well settled that, if sub-

pen, or, if such an accident could reasonably have been anticipated, the omission to provide against it would be actionable negligence, and the plaintiff would have a right of action against either or both of the wrongdoers." See also, *Texas, etc. R'y Co. v. Story*, 29 Tex. Civ. App. 483, 68 S. W. Rep. 534; *Missouri, etc. R'y Co. v. Wolf*, (Tex. Civ. App.) 89 S. W. Rep. 778.

33. *Railroad Co. v. Herold*, 74 Md. 510, 22 Atl. Rep. 323, 14 L. R. A. 75.

34. *Croft v. Steamship Co.*, 20 Wash. 175, 55 Pac. Rep. 42.

Where a passenger, owing to the insufficient means provided by the carrier for passengers to alight, from its boat, fell into the water and was drowned, the immediate

cause of the accident being the negligent operation of a boat belonging to a third person which caused it to run into a wharf boat over which the passenger was required to pass in order to reach shore, it was held that the carriers were jointly or severally liable, and that the fact that those in charge of the boat of the third person were more negligent than those in charge of the boat upon which the passenger was being carried was immaterial. *Louisville, etc. Mail Co. v. Barnes*, 25 Ky. Law Rep. 2036, 79 S. W. Rep. 261, 64 L. R. A. 574.

35. *Chicago, etc. R'y Co. v. Cain*, (Tex. Civ. App.) 84 S. W. Rep. 682.

sequent to a wrongful or negligent act, a new cause intervenes which in itself is sufficient to produce the injury, the original wrongful act will be considered as too remote to be made the basis of an action. But if the character of the intervening cause which is claimed to have broken the causal connection between the original wrongful act and the subsequent injury should be such that its consequences ought reasonably to have been foreseen and anticipated by the original wrongdoer, his act would, in law, be considered the proximate cause of the injury, and he could be held responsible. In *The Railway Co. v. Webb*,³⁶ it appeared that the plaintiff's son, while a passenger on the defendant's train, was violently thrown to the ground by a sudden jerk of the train and rendered unconscious by falling upon an adjoining track. The defendant's servants made no effort to remove him from the track, although they knew, or should have known, that trains were frequently passing over the track. Shortly afterwards he was run over and killed by an engine belonging to the Georgia Railroad Company which had a right to use the track. The defendant contended that an intervening cause had produced the injury, and that it was therefore not liable. But the court, in deciding that the defendant should be held responsible for the injury, said: "The defendant company knew that the Georgia Railroad Company had a right to use these tracks. It also knew that it might use them at any time. When, therefore, Webb was negligently thrown upon the tracks and left

36. 116 Ga. 152, 42 S. E. Rep. 395, 59 L. R. A. 109.

In *Cincinnati, etc. R. Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. Rep. 282, 16 L. R. A. 674, it appeared that a passenger through his own negligence was thrown from a rapidly moving train and rendered unconscious by striking on the track. He was later run over by another train on the same track. The servants in charge of the train from which he had fallen

had notice that he had fallen from the train, but made no effort to avert the injury which later happened. It was held that under the circumstances it was the duty of those in charge of the train from which the passenger had fallen to stop the train and remove him from the track, or at least to use reasonable means to prevent the happening of the injury; that having failed to do so the railroad company was liable.

there in a helpless condition, the defendant was bound to apprehend and anticipate that injurious consequences would likely result from the use of the track by the servants and agents of the Georgia Railroad Company in charge of its engines and trains. This being so, the negligence of the defendant, which resulted in leaving Webb helpless upon its tracks, was in law the proximate cause of his death, notwithstanding his death was actually brought about by another agency."

Sec. 915. (§ 514.) Liability of railway carrier having running powers over other road.—It has also been determined that a railway carrier who has running powers over the line, or any portion of the line, of another company, is responsible to its own passengers for injuries sustained by them through negligence in the management of the latter road, although the company carrying the passenger had no control over the road in fault, and was not, in other respects, responsible for its management. In other words, where a railway company contracts with a passenger to carry him from one terminus to another, and on the journey its train has to pass over the line of another railway company, the company making the contract for the carriage and issuing its ticket to the passenger incurs the same responsibility as it would do if the entire line belonged to it and was under its control.³⁷ This liability grows out of the implied contract in every such case, that the carrying company takes upon itself the responsibility of due care and caution on the part of all the agencies which it employs to effect the transportation of the passenger; and therefore it can make no difference as to its liability what the nature or

37. If a railroad company operates its trains over the road of another company, it must see and know that the track is in good condition, and that the trains of the other company are so ordered that they will not interfere with the full discharge of the duty which it owes to its passengers.

If the trains of such other company are so ordered as to interfere with the duty which the former company owes to its passengers, it must provide against all consequent dangers. *Murray v. The Railroad*, 66 Conn. 512, 34 Atl. Rep. 506, 32 L. R. A. 539.

consideration of the contract is under which it enjoys the right to use the road; and it will be the same whether the arrangement be made with such other road upon the basis of a division of profits, or of the gross receipts in a specified proportion, or of the payment of certain tolls, or of a mere gratuitous license by the other company. Nor can such company defend itself against the claim of the passenger by showing that it was not in fault, but that the whole blame rested upon the company whose road it was thus using.³⁸ The same rule was applied where the track of the carrier ran over a public bridge.³⁹

Sec. 916. Liability of carrier for safety of intermediate agencies employed.—If, during the transportation of the passenger, the carrier makes use of an agency which is unsafe, and by reason thereof the passenger is injured, the carrier will be liable for the injury although such agency was owned by another.⁴⁰ The contract of carriage, it is said, is interpreted

38. *Great Western Railway v. Blake*, 7 H. & N. 987; *Buxton v. The Railway Co.*, L. R. 3 Q. B. 549; *Thomas v. The Railway*, L. R. 5 Q. B. 226; *Candee v. Pennsylvania R. R.*, 21 Wis. 582; *Toledo, etc. R. R. v. Rumbold*, 40 Ill. 143; *Wyman v. The Railroad*, 46 Me. 162; *Nelson v. The Railroad*, 26 Vt. 717; *Schopman v. The Railroad*, 9 Cush. 24; *Railway Co. v. Howard*, 178 U. S. 153, 44 L. Ed. 1015; *Barkman v. The Railroad*, 89 Fed. Rep. 453; *Dunn v. The Railroad*, 71 N. J. Law, 21, 58 Atl. Rep. 164; *Railway Co. v. Martin*, 59 Kan. 473, 53 Pac. Rep. 461.

Where in pursuance of a contract, a railroad company runs its trains over a portion of the road of another company, and it is provided in the contract that the trains of the lessee company, while on such leased road, shall be un-

der the control and direction of the servants of the lessor company, the servants of the lessor company, at such place and for the time being, are the servants of the lessee company, and it will be responsible for any negligence on their part. *Murray v. The Railroad*, *supra*.

39. *Birmingham v. The Railroad*, 14 N. Y. Supp. 13.

40. *Williams v. Vanderbilt*, 28 N. Y. 217; *Hart v. The Railroad*, 8 *id.* 37; *McElroy v. The Railroad*, 4 Cush. 400; *Peters v. Rylands*, 20 Penn. St. 497; *Bostwick v. Champion*, 11 Wend. 571; 18 *id.* 175; *Weed v. The Railroad*, 19 *id.* 534; *Schopman v. The Railway Co.*, 9 Cush. 24; *Railroad Co. v. Barron*, 5 Wall. 90; *Nashville, etc. R. R. v. Carroll*, 6 Heisk. 347; *Murch v. The Railroad*, 29 N. H. 9; *Stoddard v. The Railroad*, 181 Mass.

as applying to all the instrumentalities employed, although belonging to others. Thus where a carrier by water was permitted to use a hulk which belonged to another, for the embarkation of passengers upon his steamer, it was held that he was liable to a passenger for an injury sustained by him in falling through a hatchway upon the hulk which had been negligently left open; and that the question whether he owned or had any control over the hulk, or had any hand in the negligent act, was wholly immaterial, inasmuch as he used the hulk as a means for the embarkation, which was a part of the carriage of his passengers.⁴¹ And so where it became necessary for the carrier of the passenger by stage-coach to cross a ferry upon his journey, and, by the negligence of the ferry company, an accident occurred by which the passenger lost his life, it was held that the carrier was liable, being responsible for the management of the ferry under his contract with the passenger, and for his safe passage across it.⁴²

So it is immaterial whether the carrier owns the vehicle which he uses or not, if the passenger is received in it for carriage.⁴³ If, for instance, the carrier employs a sleeping car which is owned by another company, and invites passengers to travel in it, he will be responsible for any injury resulting from the negligent equipment or operation of the car.⁴⁴

Sec. 917. (§ 515a.) Liability for injury caused by concurrent action of two carriers.—Where the injury is caused by the concurrent wrongful acts or omissions of two parties, all tending to produce the one resulting event complained of—as where a passenger is injured by a collision between the trains of different carriers upon the same track, or by a col-

422, 63 N. E. Rep. 927, citing *Wright v. The Railway*, L. R. 8 Exch. 137; *Daniel v. The Railway*, L. R. 5 H. L. 45. But see *Sprague v. Smith*, 29 Vt. 421.

41. *John v. Bacon*, L. R. 5 C. P. 437.

42. *McLean v. Burbank*, 11 Minn. 277.

43. *Hannibal, etc. R. Co. v. Martin*, 111 Ill. 219.

44. *Robinson v. The Railroad*, 135 Mich. 254, 97 N. W. Rep. 689, 10 Detroit L. N. 727; *Pullman Co. v. Norton*, (Tex. Civ. App.) 91 S. W. Rep. 841.

lision between two boats in a river⁴⁵—an action against them severally or jointly is maintainable, although there was no concert of action or common purpose between them.⁴⁶ Thus in *Eaton v. The Railroad*,⁴⁷ where the plaintiff sued the defendants as carriers of passengers for injuries sustained by him, the defense was that the accident was caused by another train, over which the defendants had no control, running into that in which the plaintiff was being carried, through the concurring negligence of another; but the court decided that this was no defense. “At the time of the injury complained of,” said Colt, J., “the relation of passenger and carrier existed by contract between the plaintiff and the defendants; they had received the plaintiff upon their cars, and were bound to the exercise of all that care and caution which the relation imposes. . . . And it is no answer to an action by a passenger against a carrier, that the negligence or the trespass of a third party contributed to the injury.”

So where a carrier is sought to be held responsible for not furnishing safe stational accommodations, it is no defense that the station is used conjointly with another company, also in fault.⁴⁸

45. *Packet Co. v. Mulligan*, 25 Ky. Law Rep. 1287, 77 S. W. Rep. 704; *Jung v. Starin*, 33 N. Y. Supp. 650, 12 Misc. Rep. 362.

46. *Flaherty v. Railway Co.*, 39 Minn. 328; *Colegrove v. Railroad Co.*, 20 N. Y. 492; *Cuddy v. Horn*, 46 Mich. 596; *Tompkins v. Railroad Co.*, 66 Cal. 163; *Central Pass. R'y Co. v. Kuhn*, 86 Ky. 578; *Union R'y Co. v. Shacklett*, 19 Ill. App. 145; *Holzal v. Railroad Co.*, 38 La. Ann. 185; *McDonald v. The Railroad*, 47 La. Ann. 1440, 17 So. Rep. 873; *Railway v. Garreiss*, 14 Ky. Law Rep. 397; *Railroad Co. v. McDonnell*, 91 Ill. App. 488.

Where a passenger, while in the

car of a railroad company, was injured by reason of the negligence of another company in operating its train at a crossing of tracks, it was held that the former company would be liable if its own employees could, by exercising a high degree of care, have avoided the injury. *Railroad Co. v. Ransom*, 56 Kan. 559, 44 Pac. Rep. 6. See also, *Louisville, etc. R'y Co. v. Blum*, — Ky. —, 89 S. W. Rep. 186; *Gulf, etc. R'y Co. v. Terry & McAfee*, (Tex. Civ. App.) 89 S. W. Rep. 792.

47. 11 Allen, 500.

48. *Louisville, etc. R'y Co. v. Lucas*, 119 Ind. 583.

Sec. 918. Liability of carrier for acts of lessees, etc.—Liability for acts of receiver.—A carrier by railroad which has received special privileges from the state cannot, without legislative authority, divest itself of its duties to the public as a carrier, or delegate their performance to another, in such manner as to relieve itself of responsibility for their proper fulfillment.⁴⁹ Where, therefore, the company, without such authorized exemption, has leased its road to another,⁵⁰ or turns it over to be operated for a limited period by a construction company,⁵¹ or conveys it to trustees selected by itself,⁵² or otherwise delegates the performance of its duties to another, even to the state,⁵³ it will be liable to passengers for injuries received from its own failure to keep the road and its appurtenances in proper condition,⁵⁴ or through the negligence of such other,⁵⁵ though the latter may be also liable severally or jointly.⁵⁶

An authorized lease, however, not otherwise providing, will

49. *Nugent v. Railroad Co.*, 80 Me. 62; *Thomas v. Railroad Co.*, 101 U. S. 71; *York, etc. R. Co. v. Winans*, 17 How. 30; *Pennsylvania Co. v. Railroad*, 118 U. S. 290; *Railroad Co. v. Brown*, 17 Wall. 450; *Gulf, etc. R. Co. v. Morris*, 67 Tex. 692; *Georgia R. & B. Co. v. Tice*, — Ga. —, 52 S. E. Rep. 916.

53. *Littlejohn v. Railroad Co.*, 148 Mass. 478, citing *Peters v. Rylands*, 20 Pa. St. 497.

54. *Nugent v. Railroad Co.*, *supra*; *St. Louis, etc. R'y Co. v. Carl*, 28 Kan. 622; *Augusta, etc. R. Co. v. Killian*, 78 Ga. 749.

55. *Nugent v. Railroad Co.*, *supra*; *Singleton v. Railroad Co.*, 70 Ga. 464; *Nelson v. Railroad Co.*, 26 Vt. 717; *Pratt v. Railroad Co.*, 42 Me. 579; *Stearns v. Railroad Co.*, 46 Me. 95; *Abbott v. Railroad Co.*, 80 N. Y. 27; *Macon, etc. R. Co. v. Mayes*, 49 Ga. 355; *Railroad Co. v. Newell*, *supra*; *Railroad Co. v. Doan*, *supra*.

50. *International, etc. R. Co. v. Dunham*, 68 Tex. 231; *Murray v. Railroad Co.*, 66 Conn. 512, 34 Atl. Rep. 506, 32 L. R. A. 539; *Railroad Co. v. Newell*, 212 Ill. 332, 72 N. E. Rep. 416; *Railroad Co. v. Doan*, 195 Ill. 168, 62 N. E. Rep. 826; *Railroad Co. v. Roller*, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; *Arrowsmith v. Railroad Co.*, 57 Fed. 165.

56. Both are liable. *International, etc., R. Co. v. Dunham*, 68 Tex. 231; *Ingersoll v. Railroad Co.*, 8 Allen, 438; *Davis v. Railroad Co.*, 121 Mass. 134; *Pennsylvania Co. v. Greso*, 102 Ill. App. 252; s. c. 79 Ill. App. 127.

51. *Chattanooga, etc. R. Co. v. Liddell*, 85 Ga. 482.

52. *Naglee v. Railroad Co.*, 83 Va. 707.

absolve the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road over which the lessor has no control.⁵⁷ So if the owner of a vehicle, such as a steamboat, leases his boat to another, thereby relinquishing all control over it, such owner never having received any special privileges from the state, he cannot be held liable for an injury to a passenger occasioned by the negligence of the person to whom he has leased the boat.⁵⁸

Where a railroad company is placed in the hands of a receiver, the surrender of its properties to him is an act which the company is compelled to do by law, and it cannot therefore be held to answer for the receiver's negligence.⁵⁹ But if the income of the road, while being operated by the receiver, has been used in improving the property, and the road in its improved condition has been returned to the railroad company and the receiver discharged, it is held that a recovery may be had against the company for an injury caused by the receiver's negligence up to the extent of the income expended by the receiver in improving the road.⁶⁰

Sec. 919. Liability of carrier for the negligence of an independent contractor.—The duty of the carrier to provide for the safe conveyance of his passengers, as far as human care and foresight will go, being absolute, he cannot, by delegating the performance of an act to an independent contractor, when

57. *Nugent v. Railroad Co.*, App.), 55 S. W. Rep. 517.

supra; *Mahoney v. Railroad Co.*, 65 Me. 68; *Arrowsmith v. The Railroad*, 57 Fed. 165; *Phillips v. The Railroad*, 62 Hun, 233, 16 N. Y. Supp. 909.

58. *Phelps v. Steamboat Co.*, 131 N. Car. 12, 42 S. E. Rep. 335; *Gulzoni v. Tyler*, 64 Cal. 334, 30 Pac. Rep. 981.

59. *Parr v. Railroad Co.*, 43 S. Car. 197, 20 S. E. Rep. 1009, 49 Am. St. Rep. 826; *San Antonio, etc., Ry. Co. v. Lynch* (Tex. Civ. App.), 55 S. W. Rep. 517.

That the receiver may be sued for his negligent acts without leave of the court first being obtained, see *Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. Rep. 587, 42 Am. St. Rep. 516.

60. *Texas, etc., Ry. Co. v. Barnhart*, 5 Tex. Civ. App. 601, 23 S. W. Rep. 801; *Railway Co. v. Boyd*, 6 Tex. Civ. App. 205, 24 S. W. Rep. 1086; *Railway Co. v. Edmond* (Tex. Civ. App.), 29 S. W. Rep. 518.

such act concerns the safety of his passengers, relieve himself from liability for an injury caused by the negligence of the independent contractor or his subordinates. If, for instance, a carrier by railroad engages an independent contractor to perform work upon its track, and such contractor negligently places a pile of stone so near the track that it comes in contact with the side of a moving coach, causing injury to a passenger in the coach, the carrier will be responsible, although he exercised the utmost care in selecting the contractor to do the work.¹ So if a railroad company contracts with a gas light company to supply its cars with gas, and by reason of the negligence of a servant of the gas light company while filling a tank in one of the cars, an explosion occurs, causing injury to a passenger, the railroad company will be liable for the injury thus caused.² But where a state required the elevation of a railroad company's tracks, and created a municipal board for the purpose which was given entire control of the work, and on account of the negligence of one of the servants of a contractor employed by the municipal board a derrick was permitted to swing over the track of the railroad company in such a way as to strike a moving passenger train, it was held that as the state had assumed entire control of the work, the railroad company was not liable for an injury thereby occasioned a passenger unless its servants had failed to exercise due care and diligence.³

Sec. 920. Liability for injury caused passenger by article brought into vehicle by another passenger.—Where the carrier has provided properly constructed vehicles and established reasonably proper rules for their management, he will not be liable for an injury to a passenger caused by an article brought into the vehicle by another passenger, unless such injury could

1. *Carrico v. The Railroad*, 39 W. Va. 86, 19 S. E. Rep. 571, 24 L. R. A. 50; *s. c.* 35 W. Va. 389, 14 S. E. Rep. 12. See also, *Steamship Co. v. Kane*, 88 Fed. 197, 31 C. C. A. 452.

2. *Chicago, etc., Ry. Co. v. Rhodes*, — Tex. Civ. App. —, 89 S. W. Rep. 869.

3. *Railroad Co. v. Baker*, 98 Fed. 694, 39 C. C. A. 237, 50 L. R. A. 201.

reasonably have been foreseen by him and provided against. Thus where a passenger took a wringer with him into a railroad car and placed it in a parcel rack over the seat, from which it fell and injured another passenger, it was held that the railroad company was not liable unless it had failed to use reasonable care.⁴ And where a passenger is injured by stumbling over a basket⁵ or valise⁶ which another passenger has placed in the aisle of the vehicle, the carrier will not be liable for the injury unless he omitted to exercise reasonable care in keeping the aisle clear.

Sec. 921. Same subject—Dangerous articles.—If a dangerous article be brought by a passenger into the carrier's vehicle, the carrier will not be liable if injury is thereby occasioned another passenger unless it can be shown that the carrier had knowledge of its presence in the vehicle and failed to exercise due care and caution to avert the injury.⁷ And although the carrier may have knowledge that a certain article has been taken into the vehicle by a passenger, he cannot be held responsible for an injury suffered by another passenger in consequence of its dangerous character unless the article was so apparently dangerous as to reasonably inform him of its real character.⁸ But if the article exhibits such signs of its real character as ought reasonably to inform the carrier that it will be likely to cause injury to passengers, and he nevertheless permits it to be taken into the vehicle, he will be charged with such knowledge of the probable consequence likely to follow from its presence in the vehicle as will make him responsible

4. *Morris v. The Railroad*, 106 N. Y. 678; *Whiting v. The Railroad*, 89 N. Y. Supp. 584, 97 App. Div. 11. clear of valises is one for the jury. *Railroad Co. v. Buckmaster*, 74 Ill. App. 575.

5. *Van Winkle v. The Railroad*, 46 Hun, 564. 7. See *Railway Co. v. Long*, 13 Tex. Civ. App. 664, 36 S. W. Rep. 485.

6. *Stinson v. The Railway Co.*, 75 Wis. 381. 8. *Clark's Adm'x v. The Railroad*, 101 Ky. 34, 39 S. W. Rep. 840, 36 L. R. A. 123, 49 S. W. Rep. 1120; *Railway Co. v. Shields*, 9 Tex. Civ. App. 652, 28 S. W. Rep.

The question whether the carrier has used reasonable care in keeping the aisle of its vehicle

if a passenger is thereby injured.⁹ The carrier would not, however, if the article were not apparently dangerous, be under any duty to examine or inspect it for the purpose of ascertaining its real character, and unless it could be shown that he was actually informed that it was dangerous, he would not be liable for an injury resulting from its presence in the vehicle.¹⁰

Sec. 922. Duty of carrier to supply vehicle with necessary service and accommodations.—It is the duty of the carrier not only to furnish vehicles which are as safe for their intended purpose as human skill and foresight can reasonably make them, but to supply them with such accommodations as are reasonably necessary for the welfare and comfort of his passengers. This duty would undoubtedly include the supplying them with an adequate corps of servants,¹¹ with suitable re-

709; *s. c.* 29 S. W. Rep. 652; *Railway Co. v. Kalidas Mukerjee*, (1901) A. C. 396, 70 L. J. P. C. 63, 84 Law T. 210.

9. In the case of *Railway Co. v. Kalidas Mukerjee*, *supra*, it appeared that a passenger brought a package of fireworks with him into the smoking car. While in the car the fireworks exploded, causing injury to other passengers. It was held that the carrier was not liable for the injuries unless the package exhibited such signs of its real character as ought to have called the attention of the carrier's servants to it; that if it exhibited such signs, the carrier would be charged with actual knowledge of its contents.

A street car company has no right to carry dogs upon a coach set apart for passengers, and it will be liable if an injury is thereby caused a passenger. *Westcott v. Railway Co.*, — Wash. —, 84 Pac. Rep. 588.

10. *Railway Co. v. Shields supra*.

Where a passenger brought with him into the carrier's vehicle a can containing gasoline, and the gasoline took fire from a match which had been thrown upon the can, causing injury to another passenger, it was held that the carrier could be held responsible only where the servants in charge of the train knew of the danger and failed to take all reasonable precautions to avert the injury; that even if aware of the presence of the can in the vehicle, they were not required in the exercise of reasonable care and vigilance to investigate its contents, and that not knowing what the can contained, the carrier was not liable. *Clark's Admx. v. The Railroad, supra*.

11. The carrier must provide such servants for the management of his vehicles, and make such reasonable arrangements therefor, as the highest care of a prudent man would suggest as necessary to a safe passage. *Murray v. The Rail-*

tiring places;¹² with seats if a day coach; with proper berths if a sleeping-car; with lights at night, and the like. And if the weather is cold, it is his duty to supply his vehicles with sufficient warmth, and for any neglect of such duty whereby a passenger suffers injury, he will be liable.¹³

road, 66 Conn. 512, 34 Atl. Rep. 506, 32 L. R. A. 539.

In *Western, etc., R. Co. v. Stanley*, 61 Md. 266, a passenger train was going through a tunnel. The door of the car was open and smoke and cinders blew in. There was no servant of the company present to close the door or look after the comfort of the passengers. A passenger went to shut the door and in doing so was injured. The company was held liable.

12. See as to this, *Wood v. Railroad Co.*, 84 Ga. 363, 10 S. E. Rep. 967, where a passenger finding the water-closet locked, got off the car in the night-time without warning, and fell through a bridge on which the train was stopped.

The carrier, however, will not be liable to a passenger for failure to provide a coach with a water closet where the passenger has sustained no injury thereby. *Henderson v. The Railway* (Tex. Civ. App.), 42 S. W. Rep. 1030.

It is the duty of a railroad company to provide its coaches with drinking water. *Hunter v. Railroad Co.*, — S. Car. —, 51 S. E. Rep. 860.

13. *Hastings v. The Railroad*, 53 Fed. 224; *Taylor v. The Railroad* (Mo.), 38 S. W. Rep. 304, citing *Hutchinson on Carr.; Railway Co. v. Harrison*, 97 Tex. 611, 80 S. W. Rep. 1139; *Railway Co.*

v. Duck, 6 Tex. Ct. Rep. 903, 72 S. W. Rep. 445; *s. c.* 2 Tex. Ct. Rep. 1042, 63 S. W. Rep. 891; *Arington v. The Railway*, 6 Tex. Ct. Rep. 69, 70 S. W. Rep. 551; *Railway Co. v. Campbell*, 30 Tex. Civ. App. 35, 69 S. W. Rep. 451; *Railway Co. v. Davis*, 17 Tex. Civ. App. 340, 43 S. W. Rep. 540, citing *Hutchinson on Carr.; Railway Co. v. Hyatt*, 12 Tex. Civ. App. 435, 34 S. W. Rep. 677, citing *Hutchinson on Carr.; Missouri, etc., Ry. Co. v. Byrd* (Tex. Civ. App.), 89 S. W. Rep. 991; *St. Louis, etc., Ry. Co. v. Haney* (Tex. Civ. App.), 94 S. W. Rep. 386.

In keeping his coaches heated in cold weather, the carrier is bound to exercise that high degree of care and diligence which would be used by very cautious, prudent and competent persons under like circumstances. *Tyler v. The Railway* (Tex. Civ. App.), 79 S. W. Rep. 1075.

In *The Railway Co. v. Harrison*, 97 Tex. 611, 80 S. W. Rep. 1139, *reversing, s. c.* (Tex. Civ. App.), 77 S. W. Rep. 1036, it appeared that a carrier of passengers undertook to carry a passenger over its own and another road in a car furnished by itself. The contract provided that the first carrier would not be liable for the negligence of any connecting carrier. While the car was passing over the road of a connecting carrier, the passenger suffered injury by

Where, however, the carrier undertakes to carry passengers by freight train, he is not required to furnish the same conveniences that he is bound to provide on trains devoted exclusively to the carriage of passengers, and he cannot, therefore, be held liable for a failure to furnish a suitable retiring place in the caboose.¹⁴

Sec. 923. Duty in respect of management and running of trains and vehicles.—Having provided suitable vehicles and proper accommodations, it is the duty of the carrier to exercise the highest degree of care and diligence in so managing, operating and running his trains and vehicles that all injuries to passengers, which human foresight can avert, may be prevented, and for a failure so to do, whereby a passenger suffers injury, the carrier will be liable in damages.¹⁵ Thus, if the servants in charge of a passenger train carelessly stop the train in such a position that it is struck by another train,¹⁶ or if they fail to properly secure a car on a side track, and the car runs upon the main track and collides with a passenger train,¹⁷ or if a rapidly moving freight train which makes no stops is permitted to follow closely behind a slowly moving passenger train which makes many stops, and the two trains collide,¹⁸ or if a freight car is sent violently against a passenger

reason of the car not being sufficiently heated. It was held that the first carrier would be liable for its failure in the first instance to furnish a car which was capable of being made comfortably warm; but that if the car was sufficient for the purpose, and the injury was occasioned by the negligence of the servants of the connecting roads, the first carrier would not be liable. To same effect, see *Missouri, etc., Ry. Co. v. Foster*, 97 Tex. 618, 619, 80 S. W. Rep. 1197, reversing *s. c.* (Tex. Civ. App.), 78 S. W. Rep. 1134.

14. *Rodgers v. Railroad Co.*, — Ark. —, 89 S. W. Rep. 468, 1 L.

R. A. (N. S.), 1145, citing *Hutch. on Carr.*

15. *White v. Railroad Co.*, 136 Mass. 321; *McElroy v. Railroad Co.*, 4 Cush. 400; *Warren v. Railroad Co.*, 8 Allen, 227; *Eaton v. Railroad Co.*, 11 Allen, 500, and cases cited in the following notes.

16. *Farlow v. Kelly*, 108 U. S. 288; *Kellow v. Railway Co.*, 62 Iowa, 470.

17. *Union Pacific Ry. Co. v. Harris*, 158 U. S. 326, 15 Sup. Ct. R. 843, 39 L. Ed. 1003.

18. *Railroad Co. v. Richmond*, 23 Ky. L. Rep. 2394, 67 S. W. Rep. 25.

Where a statute provides that in making up a passenger train,

car,¹⁹ or if the engineer of a passenger train carelessly runs his train across the track of another company, without first stopping as required by statute, and a collision ensues,²⁰ or if the servants in charge of a train negligently leave a wounded animal so near the track that it collides with another train,²¹ the railroad company will be liable if a passenger is thereby injured. So if the servants in charge of a ferry boat negligently permit the boat to come with such force against a dock that a passenger is thrown to the deck and injured, the proprietors of the ferry-boat will be liable.²²

And if by the use of proper signals, a collision between two railroad trains could have been avoided, the railroad company would be guilty of negligence for failing to give such signals. Thus if a railroad company provides a station-master and a conductor with similar uniforms and lanterns and gives them similar signals having different meanings, and the engineer on a passenger train is thereby misguided and a collision ensues,²³ or if the servants in charge of a passenger train, in stopping the train at a station, carelessly permit the rear part of the train to remain standing across the track of another

no baggage, freight, merchandise or lumber cars shall be placed in the rear of passenger cars, and a passenger is injured in an accident on a train which is made up in a manner contrary to the statute, the railroad company will be liable. *Railway Co. v. Smith*, 70 Ark. 179, 67 S. W. Rep. 865.

Whether the operation of a train with the locomotive in the rear at a place where the train is likely to collide with horses, is negligence, is a question of fact for the jury. *Railroad Co. v. Grimm*, 25 Ind. App. 494, 57 N. E. Rep. 640. The running of a freight train on a track between a station and a passenger train during the time the latter train stops at the station is negligence. *Atchison, etc., Ry. Co.*

v. Holloway, — Kan. —, 80 Pac. Rep. 31.

19. *Railroad Co. v. Means*, 136 Fed. 83, 68 C. C. A. 65.

20. *Railroad Co. v. Greenwood*, 99 Ala. 501, 14 So. Rep. 495.

21. *Railway Co. v. Lauricella* (Tex. Civ. App.), 26 S. W. Rep. 301; s. c. 87 Tex. 277, 28 S. W. Rep. 277, 47 Am. St. Rep. 103.

22. *Snelling v. Ferry Co.*, 13 N. Y. Supp. 398; *Cash v. The Railroad*, 67 N. Y. Supp. 823.

23. *Railroad Co. v. Sanders*, 98 Ala. 293, 13 So. Rep. 57.

A railroad company, if it undertakes to manage and conduct the business of running its trains by telegraph, is bound to have a proper and fit telegraph line for the purpose, with a reasonable

company, and fail to use any means to warn the approach of a train on the latter track, and the two trains collide,²⁴ the railroad company will be liable for all resulting injuries. So where an animal was upon the track of a railroad company, and the engineer neglected to keep a proper lookout to discover it in time to blow the whistle and thereby, if possible, frighten it from the track, it was held that an injury to a passenger, caused by the train colliding with the animal, was due to negligence, and that the railroad company was liable.²⁵

Sec. 924. Same subject.—Duty to avoid sudden jerks and jars.—So it is the duty of the carrier to exercise a very high degree of care and caution in so operating his vehicles that injuries to passengers, caused by sudden jerks or jars, may be avoided, and for any neglect of such duty whereby a passenger is injured, the carrier will be liable. Thus if the servants in charge of a railroad train attempt to make a running switch, and in consequence a passenger is thrown from his seat in a passenger coach, and injured, the railroad company will be liable for the injury so caused.²⁶ So where a railroad company furnishes an engine for an excursion train which is so small that in starting the train it is necessary to do so with a jerk, and in starting the train a passenger is thrown down and injured, the furnishing of so small an engine will be such negligence on the part of the railroad company as will entitle the injured passenger to a recovery.²⁷

number of telegraph stations and operators to properly conduct and control the movements of its trains. *Railway Co. v. Walker*, 154 U. S. 653, 14 Sup. Ct. R. 1189.

24. *Clark v. The Railroad*, 127 Mo. 197, 29 S. W. Rep. 1013.

Where a violent storm drove a freight car back upon the main track over which an incoming passenger train was due, and the servants of the railroad company failed to exercise proper diligence in flagging the passenger train, and a collision followed, causing

injury to a passenger, the railroad company was held liable. *Gulf, etc., Ry. Co. v. Bell*, 24 Tex. Civ. App. 579, 58 S. W. Rep. 614. See also, *Fleming v. The Railroad*, 89 Mo. App. 129.

25. *Railway Co. v. Lauricella*, 87 Tex. 277, 28 S. W. Rep. 277, 47 Am. St. Rep. 103.

26. *Chicago, etc., R. Co. v. Harlan*, 12 Ky. Law Rep. 506. See also, *Railroad Co. v. Harbin*, 160 Ind. 441, 67 N. E. Rep. 109.

27. *Farnon v. The Railroad*, 180 Mass. 212, 62 N. E. Rep. 254.

Sec. 925. Same subject—Duty to keep track free from obstructions—Duty to avert injury from obstructions placed near track.—It is the duty of the carrier by railroad to exercise a very high degree of care and caution in keeping its tracks free from obstructions which may be likely to collide or come in contact with passing trains and thus occasion injury to passengers. If, for instance, a railroad company constructs a platform freight so near its track that an object placed upon it comes in contact with and injures the elbow of a passenger which is resting for comfort on the window-sill of a passing car,²⁸ or if it permits a mail bag to hang in such close proximity to the track that it strikes against the side of a moving car and breaks the arm of a passenger,²⁹ or if it places a freight car on a side track in such a position that the door, swinging open, strikes a train running on the main track and injures the arm of a passenger which is resting on the sill of a window in one of the cars,³⁰ or if workmen, who are repairing the track, place a pile of stone so close to the track that it comes in contact with a passing train and injures a passenger,³¹ the company will be liable in damages for such injuries.

And although a third person may have placed an obstruction so near the company's track that it is likely to come in contact with passing trains and occasion injury to passengers, the railroad company will be responsible, if injury thereby result to a passenger, if the servants in charge of the train ought to have foreseen the danger in time to have averted the

But a railroad company will not be liable for injuries to a passenger received through the sudden stopping of the train, caused by another passenger inadvertently, without the railroad company's fault, setting the emergency brake. *McDonnell v. The Railroad*, 54 N. Y. Supp. 747, 35 App. Div. 147.

28. *Kird v. The Railway*, 109 La. 525, 33 So. Rep. 587, 94 Am. St.

Rep. 452, 60 L. R. A. 727; s. c. 105 La. 226, 29 So. Rep. 729.

29. *McCord v. The Railroad*, 134 N. Car. 53, 45 S. E. Rep. 1031.

30. *Clerc v. The Railroad*, 107 La. 370, 31 So. Rep. 886, 90 Am. St. Rep. 319.

31. *Carrico v. The Railroad*, 39 W. Va. 86, 19 S. E. Rep. 571, 24 L. R. A. 50; s. c. 35 W. Va. 389, 14 S. E. Rep. 12.

injury.³² Thus where a third person who was unloading stone from a flat-car by means of a derrick which was situated near the company's track, negligently permitted a stone, while attached to the derrick, to swing into a passing train, thereby injuring a passenger, it was held that the track being straight for some little distance in the direction from which the train was approaching, and there being no obstructions to prevent the engineer from seeing the danger as the train drew near the derrick, the company, in failing to apprehend the danger and provide against it, was guilty of negligence and therefore liable for the injury.³³

Sec. 926. Same subject—Duty as to speed of trains.—The fact that a railroad train is run at a high rate of speed is not of itself sufficient to charge the railroad company with negligence. But running a railroad train at a high rate of speed would be evidence of negligence if the attending circumstances were such that the dangers which are naturally incident to railroad travel were thereby increased.³⁴ In determining, therefore, whether the railroad company was negligent in

32. *Baker v. The Railroad*, 50 N. Y. Supp. 999, 28 App. Div. 316; *Kird v. The Railway*, 105 La. 226, 29 So. Rep. 729.

Where a railroad company, in order to facilitate the loading of stone from a quarry, permitted a quarryman to build and maintain a gravity road in connection with its main track, and on two or three occasions a loaded car had escaped and had been precipitated on the main track, it was held that the railroad company was bound to take notice of the dangers incident to the operation of the gravity road and that it was liable for injuries to a passenger caused by a car loaded with stone being precipitated through the side of the car in which the passenger was riding. *Lynch v. The*

Railroad, 40 N. Y. Supp. 775, 8 App. Div. 458.

It is the duty of those in charge of a railroad train to keep a sharp lookout at a place on the track where cattle or other animals are likely to come upon it. *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. Rep. 528.

33. *Railroad Co. v. Murphy*, 198 Ill. 462, 64 N. E. Rep. 1011; *s. c.* 99 Ill. App. 126.

34. *Indianapolis, etc., Ry. Co. v. Hall*, 106 Ill. 371; *Railroad Co. v. Dupont*, 128 Fed. 840, 64 C. C. A. 478.

An elderly lady, who was attempting to turn around in her berth, was thrown to the floor and injured while the train was rounding a curve at a high rate of speed. It was held that the injury was

running a train at a certain rate of speed, consideration must be given to the character of the train, the devices which were employed to guard against accident, the condition of the road-bed, the sharpness of the curves and any other circumstances which would show whether the speed tended to increase such natural dangers.³⁵ If in view of all the attending circumstances the servants in charge of the train knew, or by the exercise of a very high degree of care and foresight ought to have known that the rate of speed at which the train was running tended to increase the dangers which are naturally incident to railroad travel, the railroad company would be deemed guilty of negligence, and if an accident should result in which a passenger received an injury, it would be liable.³⁶

Sec. 927. Same subject—Doors and windows—Vestibuled trains.—Where the passenger has sustained an injury by the

due to her own act and inexperience, and that the high rate of speed at which the train was running was not necessarily evidence of negligence. *Railroad Co. v. Smith (Canada)* 31 S. C. R. 367, 1 Canadian Ry. Cases, 255, *reversing Smith v. The Railroad*, 34 S. C. R. 22, 1 Canadian Ry. Cases, 231.

35. *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. Rep. 860.

36. *Illinois, etc., R. Co. v. Leiner*, 103 Ill. App. 438; *s. c. affirmed in* 202 Ill. 624, 67 N. E. Rep. 398, 95 Am. St. Rep. 266; *Louisville, etc., Ry. Co. v. Jones*, 108 Ind. 551.

See also, *Mitchell v. The Railroad*, 87 Cal. 62, 25 Pac. Rep. 245. And see *Clare v. The Steamship Co.*, 20 Fed. 535, where the same rule is applied to vessels.

Nothing can justify or excuse the running of a train at a high rate of speed over a track which is known to be in a dangerous condi-

tion. *Railway Co. v. Lewis*, 145 Ill. 67, 33 N. E. Rep. 960; *s. c.* 48 Ill. App. 274.

If a railroad company permits passengers to stand upon the platforms of its cars while the cars are in motion, it will be liable to a passenger who is thrown from the platform of a car by the excessive speed of the train while running over a defective track. *Lynn v. Southern Pac. Co.*, 103 Cal. 7, 36 Pac. Rep. 1018, 24 L. R. A. 710.

In *Railway Co. v. Stewart*, 68 Ark. 606, 61 S. W. Rep. 169, 82 Am. St. Rep. 311, it appeared that the train upon which the plaintiff was a passenger was required by the company's schedule to run 33 miles an hour. The train was behind time, and was running at the rate of from 50 to 60 miles an hour. While running over a village crossing in the night-time the train collided with a cow, causing the engine

sudden closing of a door or window in the carrier's vehicle, the carrier will not be liable unless the occurrence was such that by the exercise of due care and caution it could have been foreseen by him and prevented.¹ Thus if a passenger, while

and several coaches to be derailed. On account of a curve in the track some distance from the crossing which caused the rays from the engine headlight to be deflected, the engineer could not possibly have seen the cow in time to have brought the train to a standstill before reaching the crossing. The engineer had been employed for some time in operating trains over that part of the road where the accident happened, and was familiar with the surroundings. In an action by the plaintiff to recover damages for an injury received in the accident, a verdict was returned against the railroad company. On appeal to the supreme court, Bunn, J., in sustaining the verdict, said: "Was it prudent for the engineer, with his knowledge of the surroundings, to run his train at this particular point at the rate of 50 or 60 miles an hour when only required by the schedule to run 33 miles an hour? The necessity of making up lost time is never so great as that of preserving human life; and even when the making up of lost time approaches necessity itself, the necessary increase of speed should be on parts of the road where a strict lookout will be reasonably effective in preventing injuries, or, at least, the probability of injury to persons and property. From the evidence, the portion of the track involved was peculiarly trying to trainmen, and some things which would have greatly aided them in the successful running of the train on other portions of the track were absent at this place,—a straight track, and perfectly level grade, or grade that would insure a quicker stop of the train than on a down grade as this was. It appears to us that without having to resort to anything that would have rendered the service less effective, or to the company less remunerative, a far less rate of speed would have been the proper thing in this instance. At the time of the collision the train was running at a rate of nearly a mile a minute. To run the 100 feet which was the greatest distance the engineer could have observed the cow required little more than a second of time. A strict lookout, as required by law, and the application of the most effective means known to slow up or stop the train could not possibly have availed anything. No effective alarm could have been given in that moment of time. These things should have been taken into account by the engineer."

1. But where the passenger is not allowed a reasonable opportunity to enter the vehicle, and by reason of the too hasty starting of the train which causes the door to suddenly close, it not being securely fastened, his hand is injured as he is endeavoring to pass into the vehicle, he is *prima facie* entitled to recover. *Poole v. Georgia R. & B. Co.*, 89 Ga. 320, 15 S. E. Rep. 321.

passing through the door of a railway car, places his hand in such a position that it is injured by the closing of the door by a servant of the company, the servant having no reason to suspect that the passenger has placed his hand in a place of danger, the railway company will not be liable.² And the same would be true if the door were closed by the ordinary movement of the train in starting or stopping,³ or by the agency of some third person.⁴ Since the opening and closing of doors and windows in the carrier's vehicles is not entirely within the control of the carrier's servants, doors and windows frequently being opened and closed by the passengers themselves, the fact that a cinder which causes injury to a passenger is blown through an open door or window will not be sufficient to charge the carrier with negligence in failing to keep the door or window closed.⁵

2. *Benson v. The Railway*, (1903) 88 Law T. 268; *Murphy v. The Railroad*, 89 Ga. 832, 15 S. E. Rep. 774.

Where the passenger is neither in the act of alighting from nor entering the train of a railway company, the fact that he suffers an injury to his finger by the shutting of the carriage door by a servant of the company will not be sufficient evidence of negligence to charge the railway company with liability. *Drury v. The Railway*, (1901) 2 K. B. 322, 70 L. J. K. B. 830, 84 Law T. 658. See also, *Cormier v. The Railroad (Canada)*, 36 N. B. 10.

3. *Skinner v. The Railroad*, 128 N. Car. 435, 39 S. E. Rep. 65; *Graf v. Railroad Co.*, — N. J. L. —, 62 Atl. Rep. 333.

Where the door was left open by reason of the closeness of the air in the car, and it was later closed by a jerk of the train upon the fingers of a passenger who was

standing on the platform of the car, it was held that the carrier was not bound to keep it from closing at a time when it was not called upon to anticipate that passengers would be standing on the platform. *Weinschenck v. Railroad Co.*, — Mass. —, 76 N. E. Rep. 662.

4. *Graeff v. Railroad Co.*, 161 Penn. St. 230, 28 Atl. Rep. 1107, 41 Am. St. Rep. 885, 23 L. R. A. 606.

5. *Railway Co. v. Orton*, 67 Kan. 848, 73 Pac. Rep. 63.

Although a window in a car is raised and left unsupported by some person other than the railway company's servants, the railway company will nevertheless be liable for an injury to a passenger caused by the window falling on his fingers, it appearing that by an inspection at the starting point the unsafe condition of the window would have been discovered. *International, etc., Ry. Co. v. Phil-*

In the absence of a custom to the contrary, a railway company is under no duty to permit entrance to its cars by way of the doors in its express or baggage cars, and no negligence can be attributed to it because it has not provided for an entrance by such means.⁶

Although a railway company owes no duty to the public to provide vestibuled trains, yet if it undertakes to do so, passengers will have the right to assume that the vestibules provided are convenient and safe, and that they will be prudently and carefully managed. If, therefore, a railway company negligently permits the appliances to get out of repair, or if a vestibule door is needlessly left open while the train is in motion, and a passenger is thereby injured, the railway company will be liable.⁷ The fact, however, that an ordinary car, intended only for local traffic, is run in a vestibuled train is not in itself sufficient to show a want of care on the part of the railway company where passengers, having occasion to use the car, can plainly see that it is not provided with vestibules.⁸

3. *Duty as to station facilities.*

Sec. 928. (§ 516.) Duty of railway carriers in respect to platforms, approaches and station accommodations.—It is the duty of railway companies as carriers of passengers to provide platforms, waiting-rooms and other reasonable accommodations for such passengers, at the stations upon such road at

lips, 29 Tex. Civ. App. 336, 69 S. W. Rep. 107.

6. *Railroad Co. v. O'Keefe*, 168 Ill. 115, 48 N. E. Rep. 294, 61 Am. St. Rep. 68, 39 L. R. A. 148; s. c. 154 Ill. 508, 39 N. E. Rep. 606; *Railway Co. v. Allender*, 59 Ill. App. 620; s. c. 47 Ill. App. 484.

7. *Crandall v. Railway Co.*, — Minn. —, 105 N. W. Rep. 185; *Wagoner v. Railroad Co.* (Tex. Civ. App.), 94 S. W. Rep. 293;

Bronson v. Oakes, 76 Fed. 734, 22 C. C. A. 520; *Robinson v. U. S. Ben. Assn.*, 132 Mich. 659, 94 N. W. Rep. 211, 102 Am. St. Rep. 436; *Robinson v. The Railroad*, 135 Mich. 254, 97 N. W. Rep. 689, 10 Detroit L. N. 727. But see *Campbell v. Canadian Pac. Ry. Co.*, 1 Canadian Ry. Cas. 258.

8. *Sanson v. The Railway*, 111 Fed. 887, 50 C. C. A. 53.

It is not negligence for those in

which they are in the habit of taking on and putting off passengers.⁹ Their public profession as such carriers is an invitation to the public to enter and to alight from their cars at their stations, and it has been held that they must not only provide safe platforms and approaches thereto, but that they are bound to make safe, for all persons who may come to such stations in order to become their passengers, or who may be put off there by them, all portions of their station grounds reasonably near to such platforms, and to which such persons may be likely to go; and for not having provided such station accommodations and safeguards, railway companies have frequently been held liable for injuries to such persons. Where, for instance, one intending to become a passenger found such accommodations at a station so disagreeable that she undertook to enter the cars before they were drawn up to the platform from which passengers generally entered them, and by reason of her so doing was injured, it was held that the company was liable, notwithstanding her imprudence; Dillon, C. J., who gave the opinion for the court, saying that it is the duty of railway passenger carriers to provide comfortable rooms for the accommodation of passengers while waiting at the stations, and to enforce such regulations in regard to smoking therein as to enable persons to occupy them in reasonable comfort.¹⁰

charge of a vestibuled train to open the side door and the floor door of a vestibuled coach as the train is approaching near a station at which it is about to stop. *Union Pac. R. Co. v. Brown*, — Kan. —, 84 Pac. Rep. 1026.

9. *Railway Co. v. Barnett*, 65 Ark. 255, 45 S. W. Rep. 550, citing *Hutch. on Carr.*; *Railroad Co. v. Taylor*, 25 Ind. App. 679, 58 N. E. Rep. 852; *Gunderman v. Railway Co.*, 58 Mo. App. 370, citing *Hutch. on Carr.*; *Chicago, etc., R.*

Co. v. Walker, 217 Ill. 605, 75 N. E. Rep. 520.

One dealing with a ticket broker, knowing him to be such, who is selling passenger tickets upon his own account, cannot charge the railroad company with negligence for not providing safe premises at the place where he applies to purchase a ticket. *Herrman v. Railway Co.*, 27 Wash. 472, 68 Pac. Rep. 82, 57 L. R. A. 390.

10. *McDonald v. The Railroad*, 23 Iowa, 124.

Sec. 929. Same subject—Like accommodations not required at all stations.—The character of the accommodations required varies, of course, with the amount of business done at a particular point, for accommodations of the same character cannot be expected in cities and at way stations;¹¹ and this rule has been recognized even in jurisdictions where statutes exist upon the subject.¹² In the case of flag stations and mere road crossings at which trains stop only on signal and for the convenience of persons wishing to take the train, railway companies may be relieved altogether of the obligation to furnish depots or platforms.¹³ But if railway companies attract unusually large crowds to any one point by means of low rate excursions, they should provide stational facilities and accommodations at that point commensurate with the number of persons thus invited to be present.¹⁴

11. *Falls v. Railroad Co.*, 97 Cal. 114, 31 Pac. Rep. 901; *Brown v. Railway Co.*, 119 Ga. 88, 46 S. E. Rep. 71.

Where the passenger knows the character of a flag station and that the station-house was not kept open there during the night-time, and he nevertheless goes to such station in the night-time to await for a train and is made sick through exposure to the weather, he cannot recover. *Sandifer's Adm'r. v. Railroad Co.*, — Ky. —, 89 S. W. Rep. 528.

12. *Louisville & N. R. Co. v. Commonwealth*, 103 Ky. 605, 45 S. W. Rep. 880, 46 S. W. Rep. 697; *State v. Minneapolis, etc., R. Co.*, 76 Minn. 469, 79 N. W. Rep. 510.

13. *Railway Co. v. Stacey*, 68 Miss. 463, 9 So. Rep. 349; *Brown v. Railway Co.*, 119 Ga. 88, 46 S. E. Rep. 71.

14. "If railroads make prodigious efforts, by offering low rates, and by extended and cap-

tivating advertisements, to secure a greater number of passengers to travel over their lines than they can safely and reasonably care for at their terminal points, and accidents follow, they must answer for the risks thus assumed. The traveling public may be justly subject to criticism for going in such vast numbers, and voluntarily assuming the extra hazards thereby incurred, but the railroad companies are nevertheless bound to take precautions commensurate to the risks they have imposed on the unprecedented crowds thus invited. What would constitute ordinary care in precautions taken for a crowd of 5,000 people might not be ordinary care in case the crowd numbered 10,000. The traveler, as one of 10,000 passengers, is entitled to the same degree of care that is due him as one of 5,000. If the carrier which has solicited the 10,000 passengers to travel over its road cannot give

Sec. 930. Same subject—Where railroad line or station facilities are still in process of construction.—The gist of an action against a railroad company for injuries resulting from improper station facilities is the express or implied invitation of the company to use those facilities as such and the passenger's reliance upon the consequent implied assurance of the company that those facilities are in good condition. A railroad company, therefore, is not liable for injuries to an intending passenger occasioned by falling down the unfinished steps of an unfinished station, there being nothing about the station to indicate that it was yet in use, and the injured person being able to see that it was still in process of being built.¹⁵ So where a person takes passage upon a construction train to go over an unfinished railroad, and is aware of its incomplete condition and that the track has but recently been laid to his destination, and that the company has not had sufficient time to build a depot or station facilities at that point, the company owes him no duty to have a suitable depot and platform at his destination, and the absence of such accommodations will not be regarded as negligence.¹⁶

Sec. 931. Same subject—Equipment and heating of waiting rooms—Retiring places.—Railway stations must be provided with reasonable appointments for the safety and essential comfort of passengers, or those intending to become passengers, while they are waiting for trains. If the weather is such as to require a fire in the waiting room to make it comfortable,

to him this proper measure of care, and an injury thereby follows, it is responsible. It cannot invite and undertake to transport more passengers than its capacity justifies, and then excuse itself by claiming an unprecedented crowd, and that ordinary care as to the passengers in its depot was used." crowd at its station. Instead of using a possible five gates, it only used one, and a passenger was jammed against a railing and sustained injuries to her spine which resulted in disability for life. The court refused to set aside a verdict for \$5,500 damages. *Taylor v. Pennsylvania Co.*, 50 Fed. 755.

In the case in which this rule was announced, a railroad company by means of advertisements and reduced rates, collected an unusual

15. *Reimer v. Railroad Co.*, 178 Mass. 54, 59 N. E. Rep. 671.

16. *Railroad Co. v. Frazer*, 55 Kan. 582, 40 Pac. Rep. 923.

it is the company's duty to maintain a fire for such purpose. A failure to provide such accommodations is *prima facie* evidence of negligence.¹⁷ In Texas, this duty is made obligatory by statute.¹⁸ So it is the company's duty to see that chairs or benches in the waiting room, which it knows to be defective and liable to cause injury to passengers, are either repaired or removed.¹⁹

The question of whether suitable retiring places must be provided in stations does not seem to have been definitely determined in America, although in Kentucky it is required by statute that railroads provide "a convenient and suitable waiting room and water-closet at all cities and towns."²⁰ In England, on the other hand, it has been held that retiring places are not necessary adjuncts of railway stations and the mere fact that railway companies make a charge to their passengers for the use of retiring places at their stations is not in the absence of undue preference, a breach of their obligations under section 2 of the Railway and Canal Traffic Act, 1854, to "afford all reasonable facilities for the receiving and forwarding and delivering of (passenger) traffic"; and the railway commissioners have no jurisdiction to enjoin railway companies to provide free retiring places and desist from making a charge for the use of them.²¹ It seems hardly possible, however, that this English view will be adopted as the law in America, for the custom has been so universal in America to provide suitable retiring places in stations at cities and towns that it should now be recognized as binding on all railway companies. In the case of smaller villages and ham-

17. *Railway Co. v. Wilson*, 70 Fed. 837, 38 C. C. A. 502; *affirmed*, 181 U. S. 57.
Ark. 136, 66 S. W. Rep. 661, 91 Am. St. Rep. 74.

18. *Railway Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. Rep. 720; *Railroad Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. Rep. 778; *Railway Co. v. McCutcheon* (Tex. Civ. App.), 77 S. W. Rep. 232.
20. *Louisville & N. R. Co. v. Commonwealth*, 102 Ky. 300, 43 S. W. Rep. 458, 53 L. R. A. 149. (Must be suitable for both men and women.)

21. *West Ham Corporation v. Railway Co.*, (1895) 64 L. J. Q. B. 340.

19. *Railway Co. v. Humble*, 97

lets the custom is probably otherwise. In any event, if a retiring place is provided, the railway company will be liable for any injury to passengers due to its failure to use ordinary care in maintaining or repairing it.²²

The length of time that waiting rooms and retiring places must be kept open is quite often regulated by statute.²³ In the absence of statute, however, they must be kept open a reasonable time before the arrival or after the departure of trains.²⁴ What is a reasonable time is a question of fact for the jury under the particular circumstances of each case.

22. In *Jordan v. Railroad Co.*, 165 Mass. 346, 43 N. E. Rep. 111, 32 L. R. A. 101, 52 Am. St. Rep. 522, the plaintiff went to the defendant's passenger station to take a train. She bought a ticket and passed into the ladies' toilet room. There was no light in any part of the station, except the ticket office. The door of the toilet room was open. The plaintiff had often been there before and was familiar with the place. When she felt with her hand for the seat she failed to find it, and fell through an opening in the floor and was injured. "The opening of the station," said the court, "for the sale of tickets upon a train which was about to pass over the railroad, and the condition of the station at the time, were an invitation to persons to come there if they wished to take a train; and the maintenance of the toilet room for a long time previously, the door of which was then open, was an invitation to lady passengers to enter if they wished to use it. The plaintiff was a passenger and the defendant owed her the highest degree of care consistent with the proper management of the business in which it was engaged.

. . . The existence of a dangerous hole in the floor of the toilet room, under the circumstances, was evidence of negligence on the part of the defendant."

23. *Railroad Co. v. Laloge*, 24 Ky. L. Rep. 693, 696, 69 S. W. Rep. 795, 62 L. R. A. 405; *Railway Co. v. Cornelius*, 10 Tex. Civ. App. 125, 30 S. W. Rep. 720; *Railroad Co. v. Pevey*, 30 Tex. Civ. App. 460, 70 S. W. Rep. 778.

24. *Railroad v. Laloge*, *supra*.

A rule requiring the waiting-room to be closed after the departure of a train, and to remain closed until 30 minutes before the departure of the next train is reasonable. Waiting rooms are not a place of lodging and accommodation for those who are not passengers. *Phillips v. Railway Co.*, 124 N. C. 123, 32 S. E. Rep. 383, 45 L. R. A. 163.

But where the agent had knowledge that an intending passenger had missed his train, owing to the negligence of the agent in furnishing him proper directions, such person having a recent wound, and the night being cold, the station should have been kept open for him until the arrival of the next train, and the carrier was

Sec. 932. Same subject—Baggage rooms.—Baggage rooms at a railway station, when open for the reception and delivery of passengers' baggage, are not private rooms, as against owners of baggage who are permitted to enter. In its relation to the public, the company is represented by the baggage master or other employe whom its puts in charge of a baggage room; and, if an owner of baggage enters upon the invitation or by permission of the baggage master, it is the invitation or permission of the company. Whether one who goes in by permission does it only for his own benefit, or for the advantage of both parties, must ordinarily be a question for the jury. Undoubtedly if a passenger enters a baggage room against the express regulation of the railroad company, and without the permission of the baggage master, the company only owes the same care to him as to an ordinary trespasser; but if the company by itself or its baggage master invites a passenger into the baggage room, it is its duty to see that the room is made safe and is without danger.²⁵

Sec. 933. Same subject—Liability for unsafe platforms.—It is the duty of the railroad company to so construct its platforms that they shall be reasonably safe for use by passengers, and to so locate them in relation to the railroad tracks that they will afford safe and convenient means of exit to and from its cars for all its passengers, including both old and young and feeble and delicate people, as well as the strong and the robust.²⁶ Thus it would be negligence on the part of the

held liable for turning him out and closing the depot. *Coleman v. Railway Co.*, 138 N. Car. 351, 50 S. E. Rep. 690.

25. *Railroad Co. v. Griffin*, 80 Fed. 278, 25 C. C. A. 413.

26. *Eichhorn v. Railway Co.*, 130 Mo. 575, 32 S. W. Rep. 993; *Dotson v. Railroad Co.*, 68 N. J. L. 679, 54 Atl. Rep. 827.

The law does not determine how of what material a platform shall be constructed. It only requires that it shall be suitable and safe. As a general rule, where an appliance, such as a platform, is not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe and convenient, it may be continued without the imputation of negligence. *Railroad Co. v. Hobbs*, 58 Ill. App. 130.

Evidence as to the unsound condition of the platform at points other than the point where an ac-

railroad company to construct its platforms so far below the lowest car steps that passengers are compelled to make dangerous leaps to reach either the cars or station platforms.²⁷ So also, it would be negligence to have such a space between the platform of the station and the platform of the car that passengers are likely to fall between them and be injured.

cident occurs when it is confined to defects in the immediate vicinity of the place of accident is competent, as tending to show that the carrier was put on notice and yet failed to exercise proper diligence to keep its platform in safe condition. *Railroad Co. v. Wyatt*, 104 Tenn. 432, 58 S. W. Rep. 308, 78 Am. St. Rep. 926.

27. *Foy v. The Railway Co.*, 18 C. B. (N. S.) 225. In this case, Bovill, Q. C., for the railway company, urged that if the plaintiff, instead of jumping from the first step, as she did (there being two), had turned herself around and availed herself of the assistance of the second and of the handles upon the car, she could have let herself down with more ease and without injury. But Williams, J., answered that "in the present fashion of female attire, the mode of descent suggested by the learned counsel would be scarcely decent." Had the accident happened to one in male attire, the argument would have been unanswerable.

Constructing a platform 26 inches below the level of the lower steps of the cars, "thus compelling the alighting passengers, even women and children, to leap from the steps, like chickens from their perches," is negligence on the part of the railroad company.

Railroad Co. v. Wingate, 143 Ind. 125, 37 N. E. Rep. 274. See also, *Truesdell v. Erie R. Co.*, 99 N. Y. Supp. 694.

The fact that the platform is 18 inches below the lowest step of the car is not in itself such negligence as to authorize a recovery. *Railway Co. v. Frey*, 25 Tex. Civ. App. 386, 61 S. W. Rep. 442.

It is a matter of common knowledge that many depot platforms, especially in large cities, are on a level with the railroad track and that some of them are cinder platforms. Whether a particular platform was suitable and sufficiently elevated for the use of passengers is a question of fact. Care and caution in its use in such case relate to "foresight," and not "hindsight." The care required as to a platform is ordinary and not extraordinary. *Railroad Co. v. Hobbs*, 58 Ill. App. 130.

It is negligence to have the passenger platform higher than the steps of a passenger coach, and to require passengers to get into a baggage car and pass from thence to the passenger coach. *Turner v. Railroad Co.*, 37 La. Ann. 648.

It may be negligence to require the passenger to alight on a small box placed on the ground. *Missouri Pac. R'y Co. v. Wortham*, 73 Tex. 25.

Whether or not such space is large enough for a passenger to fall into is a question of fact for the jury.²⁸

To construct a platform between railroad tracks which is so narrow that passengers are compelled to stand dangerously near a train has been held to be negligence for which the company is responsible in case of injury;²⁹ but where the platform is constructed so as to afford plenty of room to stand in safety, it is clearly not negligence to build it so that the nearest edge cannot be occupied in safety as a standing place while trains are passing.³⁰ This question, however, is generally interwoven with so many other facts to be taken into consideration that where it is shown that cars overlapped

28. *Railroad Co. v. Treat*, 179 Ill. 576, 54 N. E. Rep. 290, *affirming* 75 Ill. App. 327; *Randolph v. Railway Co.*, 106 Mo. App. 646, 79 S. W. Rep. 1170; *Gabriel v. Railroad Co.*, 66 N. Y. Supp. 301, 54 App. Div. 41.

In such case where the carrier undertakes to show that it had carried a very large number of passengers from the same depot without accident, and inquires of different witnesses whether or not any accidents had occurred or come to their notice, it is not error for the trial court to permit the passenger to prove in rebuttal by a witness that the witness had met with an accident at the same place when attempting to enter the carrier's train before the happening of the accident to the plaintiff. *Railroad v. Treat*, *supra*.

29. So where a passenger, while standing upon a platform of the road, was struck and killed by a passing train, it was held to be the grossest negligence to place the platform for passengers in a narrow space between two tracks at a point where a "fast

train" passed without stopping, the cars on each track overlapping the platform and leaving a very narrow space for the escape of a person standing on it. This was said to have been an imperfection or defect in the road, and the carrier was made responsible for the killing. *Pennsylvania R. R. v. Henderson*, 51 Pa. St. 315.

The railway company is bound to construct safe platforms and of sufficient size to allow safe egress from ordinary trains, and it is negligence to so construct its platform that a passenger standing on it is liable to be struck by a passing train. *Union Pac. R'y Co. v. Sue*, 25 Neb. 772; *Hulbert v. Railroad Co.*, 40 N. Y., 145; *Warren v. Railroad Co.*, 8 Allen, 227. See, also, *Lake Shore R. Co. v. Ward*, 135 Ill. 511, 26 N. E. Rep. 520; *Young v. Railroad Co.*, 171 Mass. 33, 50 N. E. Rep. 455, 41 L. R. A. 193.

30. *Railroad Co. v. Mahara*, 47 Ill. App. 208; *Dotson v. Railroad Co.*, 68 N. J. Law, 679, 54 Atl. Rep. 827; *Matthews v. Railroad Co.*, 148 Pa. St. 491, 24 Atl. Rep. 67.

the platform at all, the question of negligence is usually one for the jury.³¹

To maintain a station platform with a dangerous slope towards a lower track platform, over which slope passengers are required to pass in going from the waiting room, is clearly negligence.³² And to leave a hole in the floor of the platform, after having had knowledge of its condition, is an act of gross negligence.³³ But having provided a reasonably safe platform over which persons desiring to board its trains may safely and conveniently pass, the railroad company will have discharged its full duty in that regard and it will not be liable if a passenger is accidentally injured while upon it.³⁴ And in order to maintain an action against the company for an injury received from a passing train, the passenger's use of the platform must have been limited to the purposes for which it was manifestly adapted.³⁵ So it will not be incumbent on the railroad company to provide a platform away from the depot for the accommodation of persons who may attempt to board its trains whilst in motion,³⁶ or to save persons who may accidentally fall from the train.³⁷

31. *Railroad Co. v. Dupont*, 128 Fed. 840, 64 C. C. A. 478; *Archer v. Railroad Co.*, 106 N. Y. 589, 13 N. E. Rep. 318; *Dobiecki v. Sharp*, 88 N. Y. 203.

32. *Rathgebe v. Railroad Co.*, 179 Pa. St. 31, 36 Atl. Rep. 160.

33. *Liscomb v. The Railroad & Trans. Co.*, 6 Lans. 75; *Toledo, etc. R. R. v. Grush*, 67 Ill. 262; *Pennsylvania Co. v. Marion*, 123 Ind. 415; *Lucas v. Penn. Co.*, 120 Ind. 205; *Railway Co. v. Stansberry*, 132 Ind. 533, 32 N. E. Rep. 218; *Fullerton v. Fordyce*, 121 Mo. 1, 25 S. W. Rep. 587, 42 Am. St. Rep. 516, citing *Hutch. on Carr.*; *Barker v. Railroad Co.*, 51 W. Va. 423, 41 S. E. Rep. 148, 90 Am. St. Rep. 808; *Crowe v. Railroad Co.*, — Mich. —, 106 N. W. Rep. 395.

Evidence of holes allowed by the carrier to exist in its platform some time before a passenger's injury is inadmissible. *Railroad Co. v. Henry*, 19 Ky. L. Rep. 1783, 44 S. W. Rep. 428.

It is negligence for the carrier to leave an uncovered water box, set in the ground, in the place where the train usually stops, so that a passenger alighting from the train might easily step into it and be injured. *Railway Co. v. Hall*, 100 Fed. 760, 41 C. C. A. 50.

34. *Stokes v. Railroad Co.*, 107 N. C. 178, 11 S. E. Rep. 991.

35. *Dotson v. Railroad Co.*, 68 N. J. Law, 679, 54 Atl. Rep. 827.

36. *Walthers v. Railroad Co.*, 72 Ill. App. 354.

37. *Garneau v. Railroad Co.*, 109 Ill. App. 169.

Sec. 934. Same subject—Passengers must use platforms intended for them.—This duty of a railway company to provide safe and suitable platforms creates the reciprocal duty on the part of passengers or intended passengers, while waiting for the arrival of trains, to occupy the premises provided for them. If they voluntarily go upon other platforms,³⁸ or other parts of the same platform,³⁹ used exclusively by the company for the handling of freight, or if they pass to another part of the station yards not "intended for the use of passengers when no necessity exists therefor,"⁴⁰ and are injured, the railway company will not be liable.

Sec. 935. Same subject—Liability for obstructions on platforms.—A railway carrier is bound by law to keep its passenger station platforms free from obstruction and in such condition generally that passengers may go to and from its trains with reasonable safety. This does not mean that every indulgence of the carrier in permitting an object to remain upon the station platform, where passengers are invited to pass, will be negligence, for the character and importance of the station may be such that the carrier will have the right to use such platform for the purpose of loading and unloading freight as well as for passenger service, and in such case the presence of freight upon the platform would not of itself render the carrier guilty of negligence. But it does mean that, having in mind the uses to which its depot platform is put, it must exercise a degree of care commensurate with the added

38. *Gunderman v. Railway Co.*, 58 Mo. App. 370. and all portions of their station grounds reasonably near to the

39. *Railway Co. v. Grubbs*, 28 Tex. Civ. App. 357, 67 S. W. Rep. 519. platforms where passengers take passage on or are discharged from their cars," is too broad a statement, but is not reversible error

40. *Davis v. Railway Co.*, 29 Tex. Civ. A. 42, 68 S. W. Rep. 733. where, under the evidence, it is impossible that the jury could have been misled thereby to the injury of the plaintiff in error. *Railroad Co. v. Davidson*, 76 Fed. 518, 22 C. C. A. 306; s. c. 64 Fed. 301, 12 C. C. A. 118, 24 U. S. App. 354.

danger caused by such use, to the end that the platform shall be reasonably safe for passengers when rightfully upon it, and especially at times when passenger trains come to the station. Ordinarily the question whether due care under such circumstances has been exercised by the carrier will be a question for the jury; and if it should appear that the platform was used for freight as well as passenger traffic, the character and quality of the freight and its location on the platform, the readiness with which it could be seen, the extent to which the platform was ordinarily used in connection with incoming and outgoing trains, the number of people reasonably to be expected, the number actually present, the time of day, etc., would all be facts for the jury's consideration in determining whether reasonable care had been exercised.¹

Although it is the passenger's duty to exercise ordinary care and prudence while using the station platform, he has the right to rely upon the company protecting him against dangers which are known, or ought to be known, to the company, yet which are either not readily apparent to the passenger, or, if apparent, which cannot readily be guarded against by him. Thus it is negligence on the part of a railroad company to permit its platforms to remain covered with snow and ice so as to be unsafe for passengers alighting from trains. The railway company ought to remove it, or, if that cannot be done, to take precautions against injury to persons passing over the platforms by covering them with ashes, salt, or some substance which would render them less dangerous.² So the railway company has been held liable for injuries to a passenger who fell over a mail bag thrown on the platform by a mail clerk, it being shown that the railway company knew, or ought to have known of the practice of mail clerks to throw mail

1. *Matthieson v. Railway Co.*, App. 242; *affirmed*, 162 Ill. 185, 44 125 Iowa, 90, 100 N. W. Rep. 51; N. E. Rep. 390; *Waterbury v. Falls v. Railroad Co.*, 97 Cal. 114, Railroad Co., 104 Iowa, 32, 73 N. 31 Pac. Rep. 901 (Plaintiff stumbled over empty milk cans while on way to board train). — Me. —, 60 Atl. Rep. 710; *Weston v. Railroad Co.*, 73 N. Y.

2. *Railroad Co. v. Smith*, 59 Ill. 595.

bags on the platform as that one was thrown;³ and the railway company has been compelled to respond in damages for injuries to a passenger due to negligently leaving hose,⁴ trucks,⁵ or skids⁶ in a dangerous position. And if a railway company permits grease⁷ or oil⁸ to accumulate upon its station platform so that a passenger, while in the exercise of ordinary care for his own safety, slips and is injured, it will be liable in damages.

In all cases where the obstruction is due to third persons, and not to the servants of the carrier, the length of time the obstruction has been on the platform is a material factor in determining whether or not the carrier knew, or ought to have known, of its existence. Thus it has been held that, where there is no evidence as to the length of time a banana skin was on the station platform, the company cannot be held liable for injuries sustained by a passenger caused by his slipping on the banana skin while alighting from a train.⁹ And where the platform itself is sufficiently commodious,¹⁰ the mere accidental tripping of a passenger over the foot of the baggage master who is not aware that the passenger is passing behind him will not be such evidence of negligence as will render the company responsible.¹¹

3. *Sargent v. Railway Co.*, 114 Mo. 348, 21 S. W. Rep. 823, 19 L. R. A. 460; *Ayres v. Railroad Co.*, 158 N. Y. 254, 53 N. E. Rep. 22, *affirming* 40 N. Y. Supp. 11, 4 App. Div. 511.

4. *Baker v. Clark*, 99 Fed. 911, 40 C. C. A. 174 (Held error, in view of the conflicting testimony, for the trial court to direct a verdict for defendant).

5. *Railway Co. v. Barrett*, (Tex. Civ. App.) 80 S. W. Rep. 660; *Ry. Co. v. Reese*, 93 Ill. App. 657.

6. *Railroad Co. v. Spencer*, 61 Pac. Rep. 606, 27 Colo. 313, 51 L. R. A., 151; *Railroad Co. v. Woodbridge*, 32 Ill. App. 237. (In this last case the injury was due to

the careless handling of a truck by the baggage master.)

7. *Newcomb v. Railroad Co.*, 182 Mo. 687, 81 S. W. Rep. 1069.

8. *Barnes v. Railroad Co.*, 87 N. Y. Supp. 608, 42 Misc. 622.

9. *Goddard v. Railroad Co.*, 179 Mass. 52, 60 N. E. Rep. 486.

10. As to liability of carrier for negligently permitting baggage-trucks or skids to remain standing on platform provided for passengers, see *Railroad Co. v. Spencer*, 27 Colo. 313, 61 Pac. Rep. 606, 51 L. R. A. 151; *Railway Co. v. Barrett*, (Tex. Civ. App.) 80 S. W. Rep. 660.

11. *Connor v. Railroad Co.*, 66 N. H. 424, 30 Atl. Rep. 1121.

Sec. 936. Same subject—Liability for not lighting station.—

It is the duty of passenger carriers by railroad to exercise ordinary care in keeping their stations and platforms and the approaches thereto sufficiently lighted so that passengers, and those intending to become such, may enter upon and depart from trains with reasonable safety. Such lights should be maintained for a reasonable time before and after the arrival and departure of trains.¹² There is, however, no absolute rule of law as to what constitutes negligence in regard to the duty of a carrier by railroad to properly light its stations and platforms,¹³ for necessarily the character of the lights to be furnished at any particular station will depend upon the character and extent of the business transacted at such station.¹⁴ But the fact that a train arriving at a station is a special train, or that it arrives at an unusual hour, will be no excuse to the carrier for its failure to have the platform properly lighted.¹⁵ Where the plaintiff was put down by the road on the side of the train opposite the station, and in attempting to pass around its rear so as to reach the station while the train remained stationary, in the dark fell over some hampers which had been permitted to remain near the platform, and was injured, it was held, in an action by him against the company

12. *Railway Co. v. Battle*, 69 Ark. 369, 63 S. W. Rep. 805; *Ellis v. Railway Co.*, 120 Wis. 645, 98 N. W. Rep. 942; *Abbott v. Railroad Co.*, — Or. —, 80 Pac. Rep. 1012, 1 L. R. A. (N. S.) 851, citing *Hutch. on Carr.*

A railroad company, which permits an express company to store packages in its baggage room, owes no duty to the express company's agent, who comes to the baggage room several hours before an express train is due, to keep its depot and station premises properly lighted. *Railroad Co. v. Harbison*, 98 Tex. 490, 85 S. W. Rep. 1138.

As to the admissibility of testimony on whether or not the station was well lighted on evenings before and after the accident, see *Agulino v. Railroad Co.*, 21 R. I. 263, 43 Atl. Rep. 63; *Railway Co. v. Rowell*, 74 Ill. App. 191; s. c. 92 Ill. App. 103.

13. *Duell v. Railway Co.*, 115 Wis. 516, 92 N. W. Rep. 269; *Railroad Co. v. Ricketts*, 18 Ky. L. Rep. 687, 37 S. W. Rep. 952.

14. *Railroad Co. v. Marshall*, — Kan. —, 81 Pac. Rep. 169.

15. *Gerhart v. Railroad Co.*, 110 Mo. App. 105, 84 S. W. Rep. 100.

for not sufficiently lighting its station, and for not providing proper and sufficient accommodations for its passengers to depart safely from the station after their arrival, that he could recover for the injury.¹⁶ And where a person who intended to go on its cars as a passenger, arriving at the station when it was dark, and just as the train was about to start, while running along the line of the road to reach the train in time, stumbled over a switch handle and sustained an injury thereby, and sued the company for not properly lighting its station, and for otherwise negligently managing it, the jury having found that there was negligence on the part of the company, and having given damages to the plaintiff, the court refused to disturb the verdict.¹⁷ And in a great variety of other cases it has been held that the company is liable for an injury occasioned by its failure to properly light its station and its approaches and the surrounding premises.¹⁸

16. *Nicholson v. The Railway Co.*, 3 H. & C. 534.

17. *Martin v. The Railway*, 16 Com. B. 179.

18. *Moses v. Railroad Co.*, 39 La. Ann. 649; *Stewart v. Railroad Co.*, 53 Tex. 289; *Forsyth v. Railroad Co.*, 103 Mass. 510; *Beard v. Railroad Co.*, 48 Vt. 101; *Alabama, etc. R. Co. v. Arnold*, 50 Ala. 600; *Buenemann v. Railway Co.*, 32 Minn. 390; *Quaife v. Railway Co.*, 48 Wis. 513; *Gaynor v. Railway Co.*, 100 Mass. 208; *For- dyce v. Merrill*, 49 Ark. 277; *Pen- iston v. Railway Co.*, 34 La. Ann. 777; *Texas, etc. R'y Co. v. Brown*, 78 Tex. 397, 14 S. W. Rep. 1034; *Alexandria, etc. R. Co. v. Hern- don*, 87 Va. 193, 12 S. E. Rep. 289; *Railway Co. v. Wood*, 104 Fed. 663 44 C. C. A. 118; *Chadbourn v. Railroad Co.*, 104 Ill. App. 333; *Railway Co. v. Treadway*, 143 Ind. 689, 40 N. E. Rep. 807; *Glenn v. Railroad Co.*, — Ind. App. —,

73 N. E. Rep. 861; s. c. 75 N. E. Rep. 282; *Sargent v. Railway Co.*, 114 Mo. 348, 21 S. W. Rep. 823, 19 L. R. A. 460, citing *Hutch. on Carr.*; *Waller v. Railway Co.*, 59 Mo. App. 410; *Green v. Railroad Co.*, 53 N. Y. Supp. 500, 31 App. Div. 412; *Fox v. Mayor, etc. of City of New York*, 39 N. Y. Supp. 309, 5 App. Div. 349.

In *Missouri Pac. R'y Co. v. Neiswanger*, 41 Kan. 621, 21 Pac. Rep. 582, plaintiff, a woman, had gone to defendant's station before dark to take a train, and, having purchased her ticket, awaited the train in the waiting-room. The train was long delayed, and about eleven o'clock in the night-time, plaintiff being urged by a call of nature sought a place to retire. As there were no closets or other like accommodations, and as there was no ticket or other agent present to direct her, she went out of the station accompanied by two

But where a person going to take a train arrives at the station after the last train has gone and remains thereafter for his own convenience, during which time the station master puts out the lights as the usual closing hour has arrived, such person is thereafter merely a licensee and not a passenger,

lady friends. The platform was not lighted and was raised about three feet from the ground, and had no railing or other guard. There was just sufficient natural light to enable the plaintiff to distinguish the platform from the ground, but not enough to enable her to see that they were not on the same level. She fell off the platform and was injured. The railroad company was held liable, being negligent in not providing suitable accommodations, in not guarding its platform, and in not lighting it so that passengers could see the danger. Compare this case with *McKone v. Railroad Co.*, 51 Mich. 601, where a man, who had come to the depot to meet his wife who was expected on the train, was injured under like circumstances and for which the company was held liable. In *Moses v. Railroad Co.*, 39 La. Ann. 649, the company left its sleeping-car standing outside the yard at a point reached by a sidewalk and usually lighted only by a city light. The company left some of its cars standing in such a position that they cut off this light from the walk. A passenger in seeking the car along the walk, no agent of the company being provided to show the way, fell off the walk and was injured. The company was held liable. Compare also with *Reed v. Railroad Co.*, 84 Va. 231, where the com-

pany was held not liable. See, also, *Wallace v. Railroad Co.*, 8 Houst. 529, 18 Atl. Rep. 818.

In *Railway Co. v. Turner*, 85 Fed. 369, 29 C. C. A. 196, the facts were very similar to those in *Railway Co. v. Neiswanger*, the essential difference being that the passenger went to the edge of the platform for the purpose of sitting upon it. The Circuit Court of Appeals for the Eighth Circuit, in reversing the judgment of the trial court, said: "No parallel to this action is found in any recognized authorities. The case of *Railway Co. v. Neiswanger* (Kan. Sup.) 21 Pac. 582, principally relied upon by the court below, is not entirely this case, in that the plaintiff there did not purposely undertake to sit down on the edge of the platform, knowing that it was not protected, but undertook, under imperative necessity, to pass from the platform to seek permissible concealment under circumstances that did not admit of deliberate movement. The exoneration from contributory negligence in that case was extreme, and ought not to be extended, lest its application should lead to a practical establishment of the doctrine that a railroad company is to be treated as an absolute insurer of the safety of passengers waiting about its platform, however eccentric and thoughtless in their strolling

and he cannot recover for injuries sustained in leaving the station caused by the extinguishment of the lights.¹⁹ So the company is not liable where a person waiting at its depot recklessly walks off in the darkness caused by the temporary removal of the light,²⁰ nor where it has furnished all the light which experience had shown to be necessary, though a passenger was, nevertheless, injured.²¹ And the failure of the railroad company to light its station cannot be held to be the proximate cause of an assault on a female passenger by a third person who enters the station while the passenger is seated there alone, and the company is consequently not liable for such injury.²²

Sec. 937. Same subject—Duty in respect to providing means for getting to or from stations and trains.—It is also the duty of passenger carriers by railroad to provide reasonably safe means of getting to or from their stations and trains.²³ Thus, if a railroad company erects a bridge for more

movements. We prefer the better sustained rule recognized in *Forsyth v. Railroad Co.*, 103 Mass. 570; *Reed v. Railroad Co.*, 84 Va. 231, 4 S. E. 587; *Bennett v. Railway Co.*, 57 Conn. 422, 18 Atl. 668; *Railway Co. v. Hodges*, (Tex. Civ. App.) 24 S. W. 563; *Chewning v. Railway Co.*, (Ala.) 14 South 204. These cases support the rule that, although a railway company may be guilty of some negligence in not providing sufficient lights or railings about its platform, yet when these deficiencies are known, or are obvious to the passenger, and notwithstanding he sees fit voluntarily, without invitation from the company, and for his mere convenience to undertake to pass over the edge of the platform, without knowledge of its elevation, the law will not excuse his negligence in taking no other pre-

caution than a casual look when the night is so dark as to deceive the eye in appearances. The passenger ought not to cast the consequences resulting immediately from his own reckless impulse upon the railway company for not fencing or patrolling its platform or flooding the ground around it with artificial lights."

19. *Heinlein v. Railroad Co.*, 147 Mass. 136; *Bradley v. Railway Co.*, 107 Mich. 243, 65 N. W. Rep. 102; *Railway Co. v. Hodges*, (Tex. Civ. App.) 24 S. W. Rep. 563.

20. *Reed v. Railroad Co.*, 84 Va. 231, 4 S. E. Rep. 587.

21. *Laffin v. Railroad Co.*, 106 N. Y. 136.

22. *Prokop v. Railway Co.*, (Tex. Civ. App.) 79 S. W. Rep. 101.

23. *Collins v. Railway Co.*, 80

convenient access to its station, and the bridge falls,²⁴ or if it fails to plank it or place proper guard rails around it, or to keep it in suitable repair,²⁵ and injury results to a passenger or to a person intending to become such, it will be liable in damages. And where a train was reached by a narrow passage way of boards, such boards being only three or four inches in width, and the plaintiff was suddenly pushed from the passage way by a third person and severely injured, the railroad company was held guilty of negligence in failing to maintain a safe and adequate passage way for its passengers.²⁶ A railroad company, however, is only bound to furnish one safe exit from its trains, provided such exit is sufficient for the number of passengers which it carries. But in the absence of knowledge that only one route has been provided by the company for leaving its trains, and in the absence of any direction or notice from the company to use a particular route, the passenger is at liberty to make use of any route which appears to him, while acting as a reasonably prudent person, to be designed for use by foot passengers; and, as to him, the company is bound to see that all such routes are reasonably safe and sufficient. Whether the passenger was justified in selecting a particular route, and whether, in attempting to pass over it in the condition it appeared to him to be in, he was in the exercise of reasonable care, and whether the route itself was reasonably safe and sufficient, are usually questions of fact for the jury.²⁷ So if passen-

- Mich. 390; *Cross v. Railway Co.*, 69 Mich. 363; *Wallace v. Railroad Co.*, (Del.) 8 Houst. 529, 18 Atl. Rep. 818; *Hoffman v. Railroad Co.*, 75 N. Y. 605; *Burgess v. The Railway Co.*, 6 Com. B. (N. S.) 923; *Railway Co. v. Evans*, 52 Neb. 50, 71 N. W. Rep. 1062; *Flanagan v. Railroad Co.*, 181 Pa. St. 237, 37 Atl. Rep. 341; *Howland v. Railroad Co.*, 26 R. I. 138, 58 Atl. 683; *Sullivan v. Canal Co.*, 72 Vt. 353, 47 Atl. 1084.
24. *Longmore v. The Railway*, 19 Com. B. (N. S.) 183.
25. *Railroad Co. v. Foley*, 53 Fed. 459, 3 C. C. A. 589, 10 U. S. App. 537; *Watson v. Oxanna Land Co.*, 92 Ala. 320, 8 So. Rep 770; *Gilmore v. Railroad Co.*, 154 Pa. St. 375, 25 Atl. Rep. 774.
26. *Redner v. Railway Co.*, 73 Hun, 562, 26 N. Y. Supp. 1050.
27. *Cazneau v. Railroad Co.*, 161 Mass. 355, 37 N. E. Rep. 311.

gers habitually, naturally, and with the acquiescence of the carrier, adopt a certain route, especially a route pointed out by the customs and methods of the carrier, it is the duty of the latter to take reasonable precautions to so guard and maintain it that passengers will not thereby suffer injury.²⁸ It is immaterial in this respect whether the carrier furnished the route, or provided or constructed the means of passage or not. If, with full knowledge of the facts, it permits an unsafe and dangerous means to be provided and used, it is as much liable for an injury arising therefrom as though it had itself set up and maintained the dangerous way.²⁹

But where the railroad company has provided all necessary station facilities for enabling its passengers to enter or depart from its stations and trains, and such facilities are reasonably safe and convenient, it will, in respect to such facilities, have performed its full duty, and it cannot be bound to suppose that a passenger who does not know the way will neglect to avail himself of the means open to his sight³⁰ and go

28. *Texas, etc. R'y Co. v. Orr*, 46 Ark. 182.

29. *Collins v. Railway Co.*, 80 Mich. 390; *Cross v. Railway Co.*, 69 Mich. 363; *Beard v. Railroad Co.*, 48 Vt. 101; *Delaware, etc. R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Atl. Rep. 178; *Keefe v. Railroad Co.*, 142 Mass. 251; *Skottowe v. Railway Co.*, 22 Ore. 430, 30 Pac. Rep. 222, 16 L. R. A. 593, citing *Hutch on Carr.*; *Schlesinger v. Manhattan R'y Co.*, 98 N. Y. Supp. 840. (In this case the approaches were owned by the city.)

A passenger was going along a pathway ordinarily used by passengers in getting to and from the carrier's passenger station, and while so doing, slipped and fell on an accumulation of ice which the company had permitted

to gather on such pathway, the ice having formed from waste water from a nearby pump. A slight snow concealed the mound of ice from the passenger's view. It was shown that the company had knowledge that this means of egress from its station was used by passengers. It was held that the company was liable for the injury even though it had provided another and safe way for the use of its passengers. *Lemon v. Railway Co.*, 136 Mich. 647, 100 N. W. Rep. 22.

30. When a carrier has provided a safe and commodious exit from its train, a passenger who leaves a train and proceeds along the track, instead of to the safe exit provided, becomes a trespasser to whom the railroad company is only liable for willful

off in the darkness somewhere else,³¹ or climb over a locked gate and go in another direction than the one intended for passengers to follow.³²

All the courts agree that a railroad company is bound to exercise reasonable care in keeping the stairways in its stations in safe and suitable condition, but they seem to differ in their views as to what will constitute such reasonable care. The rule in Illinois in this respect seems to be much more strict than that in New York.³³

So the sidewalk adjoining the depot over which passengers are invited to pass to reach or depart from the waiting room must be maintained in a reasonably safe condition, and this

or wanton injury. *Railroad Co. v. Oberhoefer*, 76 Ill. App. 672.

So when a passenger leaves a train voluntarily for the sole purpose of continuing his journey on foot, the railroad company is under no obligation to furnish him a safe path for his further progress. *Buckley v. Railroad Co.*, 161 Mass. 26, 36 N. E. Rep. 583.

So where a passenger has a safe route to the eating house open to him and chooses a path by which he may be injured by trucks being unloaded from the baggage cars, the company is not liable. *Duverniet v. Railroad Co.*, 49 La. Ann. 484, 21 So. Rep. 644.

31. *Sturgis v. Railway Co.*, 72 Mich. 619. See, also, *Bennett v. Railroad Co.*, 57 Conn. 422; *Parsons v. Railroad Co.*, 85 Hun, 23, 32 N. Y. Supp. 598.

32. *Railroad Co. v. Harrison* 100 Ill. App. 211.

33. In *Railroad Co. v. Keegan*, 210 Ill. 150, 71 N. E. Rep. 321, affirming 112 Ill. App. 28, the stairs of the station were icy and the plaintiff (appellee) fell to the bottom. The court said: "A

number of other witnesses who arrived at the station about the time the appellee fell, or were called there to assist in removing her to her home, testified that the steps were covered with slush, snow and ice, and were very slippery. They concurred in saying a coating of slush, snow and ice covered the step from 1½ to 3 inches thick. The appellant did not attempt to contest their statements, but sought to excuse itself on the ground that it had two or three men present whose duty it was to keep its platforms and said stairway free from slush, snow and ice. The stairway in question was the only means of egress and ingress to and from the station of appellant, and was used exclusively by its patrons. It was the duty of the appellant to use reasonable care to keep said stairway in a reasonably safe condition, and, in view of the evidence heretofore referred to, the questions whether it used such reasonable care, and what was the condition of the steps at the time of the injury,

duty as to their maintenance rests upon the railroad company.³⁴

If the car in which a passenger is seated does not reach the platform,³⁵ and he is invited by some one in authority to alight,³⁶ the company will be liable for injuries sustained by him which are caused by its failure to provide a way which is reasonably safe for him to reach the platform. So where in consequence of there being a train ahead, the one in which the plaintiff was could not be brought up to the platform, and she was requested by a servant of the company to alight where she was, the distance from the floor of the carriage to the

were questions of fact for the jury. The fact that the appellant had men present, whose duty it was to remove the slush, snow and ice from the steps, would not excuse it for a failure to keep the stairway in a reasonably safe condition for use by persons seeking to take passage upon its trains, if such employes failed and neglected to use due diligence to remove the slush, snow and ice deposited upon said steps. The trial court did not err in declining to take the case from the jury, but properly left to them the question whether the appellant used proper diligence to keep said steps in a reasonably safe condition under the circumstances as disclosed by the evidence."

In *Kelly v. Railroad Co.*, 112 N. Y. 443, a passenger going from an elevated railroad train about half past five in the morning, fell and received fatal injuries while going down the steps leading from the station to the street. A substantial hand-rail was provided for the steps and each step was covered with rubber. The steps

were covered by a roof projecting about a foot on each side of the steps, but the sides were open above the hand-rail. During the night there had been a severe storm of sleet and snow which continued till about four o'clock that morning, and streets, steps, sidewalks and all exposed places were slippery. No ashes or sawdust had been sprinkled on the steps nor had they yet been cleaned off. The trial court held the defendant practically to the requirement of the greatest care and skill which human foresight could think of, but the court of appeal disapproved of this, evidently considering that there was no duty on the part of a railway company to keep men continuously at work removing slush and snow during the progress of a storm.

34. *O'Reilly v. Railroad Co.*, 44 N. Y. Supp. 264, 15 App. Div. 79; s. c. 38 N. Y. Supp. 779, 4 App. Div. 139.

35. *Railway Co. v. Harris*, 103 Va. 635, 49 S. E. Rep. 997.

36. *Railway Co. v. Smith*, 103 Va. 326, 49 S. E. Rep. 487.

ground being about three feet, and, with the assistance of another person, she jumped down and was injured by the concussion, the jury having found for the plaintiff, their verdict was upheld by the court on the ground that the company had not provided a place and means of descent from the car reasonably convenient.³⁷ But in a case almost exactly the same as to its facts, where the train had overshot the platform, and the passenger undertook to descend from the car of her own accord, and without any invitation or suggestion to do so from any servant of the company, and was injured in the attempt, it was held that the company was not liable.³⁸ It will be negligence, however, for the railroad company to permit a freight train on a side track to block the crossing or passage way to the depot at a time when a passenger train is taking on or discharging passengers.³⁹

Sec. 938. Same subject—How when station facilities are not owned by the railroad company—Union depots.—The duty of maintaining reasonably safe and sufficient station facilities for the accommodation of its patrons devolves primarily upon the railroad company, and it cannot escape liability for injuries resulting from its failure to exercise ordinary care in their maintenance by showing that it delegated such duty to a third person, or that the station facilities used by it were owned and controlled by another.⁴⁰ Thus where a railroad company impliedly invited its passengers to leave its grounds by way of a stile over a barb wire fence, and a passenger was injured through a defect in the stile, it was held to be incumbent on the railroad company to show that it had exercised ordinary care in maintaining the stile in a condition suitable

37. *Floy v. Railway Co.*, 18 C. B. (N. S.) 225.

38. *Siner v. The Railway Co.*, L. R. 3 Exch. 150, L. R. 4 Exch. 117.

39. *Railroad Co. v. Keller*, 20 Ky. L. Rep. 957, 47 S. W. Rep. 1072; *Mayne v. Railway Co.*, 12 Okl. 10, 69 Pac. Rep. 933.

40. *Leveret v. Railway Co.*, 110 La. 399, 34 So. Rep. 579; *Penfield v. Railway Co.*, 50 N. Y. Supp. 79, 26 App. Div. 413; *Owen v. Railway Co.*, 69 Pac. Rep. 757, 29 Wash. 207; *Houston, etc. R'y Co. v. McCarty*, — Tex. Civ. App. —, 89 S. W. Rep. 805.

for its intended purpose, and that the fact that it was owned by another and was located on property upon which the company was not entitled to go to make repairs would be no excuse to it for permitting the stile to become unsafe for use by its passengers.⁴¹ So the fact that a depot which is used by a railroad company is owned by, and is under the control of a union depot company cannot relieve the railroad company from liability for injuries to its passengers caused by the unsafe condition of the depot or platform provided by the depot company unless, indeed, the duty to use a union depot, controlled by a separate corporation, is made obligatory by statute.⁴² And where two intersecting railroad companies make use of a common depot or platform, each company will owe to its passengers the duty of exercising ordinary care in maintaining the depot and platform in a reasonably safe condition.⁴³ If a depot and platform, owned by one railroad company, are made use of by another company for the purpose of receiving and discharging its passengers, the former company must exercise ordinary diligence in maintaining the depot and platform in a reasonably safe and suitable condition, not only for use by its own, but the passengers of the latter company.⁴⁴ But an intersecting railroad company, other than the owner of the depot premises, which runs no trains during the night, cannot be held liable for injuries sustained by a passenger of another railroad company caused by a failure to properly light the depot platform.⁴⁵

Sec. 939. (§ 520.) Same subject—Passenger not justified in incurring danger to avoid inconvenience.—The result of the cases would seem to be that, while it is the duty of such carriers to provide accommodations reasonably convenient for

41. *Cotant v. Railway Co.*, 125 180 Mass. 427, 62 N. E. Rep. 731.
Iowa, 46, 99 N. W. Rep. 115, 69 44. *Railway Co. v. Glenk*, 9
L. R. A. 982. Tex. Civ. App. 599, 30 S. W. Rep.

42. *Herrman v. Railway Co.*, 278.
27 Wash. 472, 68 Pac. Rep. 82, 45. *Railway Co. v. Treadway*,
57 L. R. A. 390. 142 Ind. 475, 40 N. E. Rep. 807.

43. *Frazier v. Railroad Co.*,

passengers awaiting the arrival of trains, or who may be put off at their stations, the primary consideration is the safety, and not the comfort, of such passengers; and to say, because the carrier has not provided comfortable accommodations, that therefore the passenger may ignore the ordinary dictates of prudence and hold it responsible for the consequences, is to say that when the choice is between danger and discomfort the party may choose the dangerous course and hold the carrier responsible, a position which neither reason nor law will support. There could be no plausible ground upon which he could be held liable under such circumstances, unless "the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous and executed without carelessness."⁴⁶

46. Per Brett, J., in *Adams v. The Railway Co.*, L. R. 4 C. P. 739.

In this case the door of the carriage in which the plaintiff was being carried flew open several times. There was room in the carriage for the plaintiff to sit away from the door, and the train would have stopped at the alighting station in three minutes. The door having opened a fourth time, the plaintiff endeavored to shut it, and in doing so used both hands, and, not holding on with either, fell out and was hurt.

Smith, J.: . . . "He was obviously doing that which was dangerous, it was said, and the ground upon which the plaintiff puts his case is that it was necessary to do so to obviate the results of the defendants' negligence. I quite agree that if the negligence of a railway company puts a passenger in a situation of alternative danger, that is to say, if he will be in danger by re-

maining still and in danger if he attempts to escape, then if he attempts to escape, any injury that he may sustain in so doing is a consequence of the company's negligence; but if he is only suffering some inconvenience, and to avoid that he voluntarily runs into danger and injury ensues, that cannot be said to be the result of the company's negligence. It is hardly necessary to say that though I use the words 'danger' and 'inconvenience,' yet if the inconvenience is very great and the danger run in avoiding it very slight, it may not be unreasonable to incur that danger. Here, however, I see no proof that the plaintiff was suffering any inconvenience; certainly none comparable to the danger he ran in endeavoring to close the door in the way he did."

Brett, J.: . . . "I think the jury were justified in finding that the defendants were negligent; but the immediate result of their negligence was not any peril to

Sec. 940. (§ 521.) Same subject—Not liable for not guarding against accidents not reasonably to be anticipated.—While requiring of carriers of passengers by railroad such station arrangements as are intended to secure the safety of the passenger, the law will, in this respect, demand nothing unreasonable. Thus, where brass nosings upon the steps which led to the platform had been worn very smooth by constant use for a long time, in consequence of which the plaintiff slipped and fell, it was held that he could not recover, although it was shown to be the opinion of those experienced in such matters, that if the nosings had been made of lead instead of brass, the accident would not probably have occurred; nor was it negligence not to provide the stairway with hand-railings when it was protected by walls on both sides.⁴⁷ So where the foot of a weighing machine, used for weighing baggage, projected some six inches above the floor of the platform, but had been so used for a long time without occasioning an accident, it was held that the company could not be held liable for negligence at the suit of a passenger who had stumbled over it and hurt himself, there having been no reasonable ground for anticipating such an accident under the circumstances.⁴⁸ And

the plaintiff, but only considerable inconvenience. It has been argued that no amount of inconvenience, if there be no actual peril, will justify a person incurring danger in an attempt to get rid of it. I confess I am not prepared to go that length. I think if the inconvenience is so great that it is reasonable to get rid of it by an act not obviously dangerous, and executed without carelessness, the person causing the inconvenience by his negligence would be liable for any injury that might result from an attempt to avoid such inconvenience. I think here the jury might well find that there was no

obvious danger and that the act was not carelessly done; but I think the inconvenience was not so great as to make it reasonable for the plaintiff to get rid of it in this way."

47. *Crafter v. The Railway Co.*, L. R. 1 C. P. 300.

48. *Cornman v. The Railway Co.*, 4 H. & N. 781. And see further upon this subject, *Beard v. The Railroad*, 48 Vt. 101; *Hulbert v. The Railroad*, 40 N. Y. 145; *Patten v. The Railroad*, 32 Wis. 524, 36 Wis. 413; *Gaynor v. The Railroad*, 100 Mass. 208; *Forsyth v. The Railroad*, 103 *id.* 510; *Smith v. The Railway*, L. R. 2 C. P. 4; *Byrne v. Boadle*, 2 H.

where a runaway horse broke through the gate, passed between a locomotive and a telegraph pole and went up on the platform and injured a passenger standing there, it was held that there was no evidence of negligence on the part of the railroad company.⁴⁹

Sec. 941. Same subject—The degree of care required.—The degree of care required of carriers of passengers by railroad in respect of their stational arrangements is, as has been seen, not so great as in respect of their tracks and running machinery. The law requires in the latter case the utmost care which human foresight can suggest, but for the approaches to the cars, such as platforms, halls, stairways and the like, a less degree of care is required, and for the reason that the consequences of a neglect of the highest skill and care which human foresight can attain to are naturally of a much less serious nature. The rule in such cases is that the carrier is bound sim-

& C. 722; *Scott v. London Dock Co.*, 3 *id.* 596; *Hammack v. White*, 11 Com. B. (N. S.) 588; *Welfare v. The Railway*, L. R. 4 Q. B. 693; *Petty v. The Railway*, L. R. 5 C. P. 461; *Phillips v. The Railroad*, 57 Barb. 644; *Murch v. The Railroad*, 29 N. H. 9; *Warren v. The Railroad*, 8 Allen, 227; *Chicago, etc. R. R. v. Dewey*, 26 Ill. 255; *Penn. etc. R. R. v. Zebe*, 33 Penn. St. 318.

In *Kirby v. Canal Co.*, 46 N. Y. Supp. 777, 20 App. Div. 473, the depot of the railroad company had been destroyed by fire. It sought a temporary place for the sale of its tickets and the reception of those proposing to become passengers upon its trains. The place it secured was in an hotel occupied by the family of the proprietor and by guests and travelers. When it went there, there was no question but what it was

a reasonably safe and proper place. During its occupancy, the landlord placed in the hotel a heating apparatus, a system in common use, and which the testimony showed to have been a reasonably safe one from which no danger was to be apprehended if it was properly operated and controlled. The apparatus exploded and a passenger in the waiting room was injured. The court held that the danger was neither known nor reasonably to be apprehended by the railroad company; that it had no right to undertake the operation of the heating apparatus itself and that it was not incumbent upon it to keep constant watch and guard over the valve of the heating apparatus.

49. *Brooks v. Railroad Co.*, 168 Mass. 164, 46 N. E. Rep. 566.

ply to exercise only ordinary care in view of the dangers to be apprehended.⁵⁰

Sec. 942. Duty of carriers by water in respect to wharves, approaches and station facilities.—Carriers by water are not exonerated by the peculiar and sometimes perilous nature of their calling from providing reasonably safe and sufficient facilities for embarking and discharging their passengers. This duty extends not only to providing reasonably safe and suitable docks and approaches, but also to the exercise of due care in mooring their vessels to or in taking them from the docks. Thus it is negligence on the part of a carrier by water to so moor a boat, when there is no real necessity therefor, that there is a space in which it plays to and fro, or in which it

50. *Railway Co. v. Barnett*, 65 Ark. 255, 45 S. W. Rep. 550, citing *Hutch. on Carr.*; *Falls v. Railroad Co.*, 97 Cal. 114, 31 Pac. Rep. 901; *Railway Co. v. Reeves*, 116 Ga. 743, 42 S. E. Rep. 1015; *Brown v. Railway Co.*, 119 Ga. 88, 46 S. E. Rep. 71; *Railway Co. v. Brown*, 120 Ga. 380, 47 S. E. Rep. 942; *Railway Co. v. Stewart*, 77 Ill. App. 66, citing *Hutch. on Carr.*; *Hiatt v. Railway Co.*, 96 Iowa, 169, 64 N. W. Rep. 766; *Railroad Co. v. Reynolds*, 24 Ky. L. Rep. 1402, 71 S. W. Rep. 516; *Maxfield v. Railroad Co.*, — Me. —, 60 Atl. Rep. 710; *Moreland v. Railroad Co.*, 141 Mass. 31; *McCormick v. Railway Co.*, — Mich. —, 104 N. W. Rep. 390; *Gunderman v. Railway Co.*, 58 Mo. App. 370, citing *Hutch. on Carr.*; *Robertson v. Railroad Co.*, 152 Mo. 382, 53 S. W. Rep. 1082; *Dotson v. Railroad Co.*, 68 N. J. Law 679, 54 Atl. Rep. 827; *Falk v. Railroad Co.*, 56 N. J. Law 380, 29 Atl. Rep. 157; *Kelly v. Railroad Co.*, 112 N. Y. 443; *Laffin v. Railroad Co.*, 106 N. Y. 136; *Mayne v. Railway Co.*, 12 Okl. 10, 69 Pac. Rep. 933; *Johns v. Railroad Co.*, 39 S. C. 162, 17 S. E. Rep. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709; *Railway Co. v. Butcher*, 83 Tex. 309, 18 S. W. Rep. 583; *Herrman v. Railway Co.*, 27 Wash. 472, 68 Pac. Rep. 82, 57 L. R. A. 390; *Duell v. Railway Co.*, 115 Wis. 516, 92 N. W. Rep. 269; *Crowe v. Railroad Co.*, — Mich. —, 106 N. W. Rep. 395; *Pincus v. Railroad Co.*, — N. C. —, 53 S. E. Rep. 297; *Houston, etc. R'y. Co. v. McCarty*, — Tex. Civ. App. —, 89 S. W. Rep. 805; *Pittsburg, etc. R'y Co. v. Harris*, — Ind. App. —, 77 N. E. Rep. 1051.
- In Nebraska, by statute, a person who is upon the station grounds, awaiting the departure of his train, is entitled to the same degree of care as a passenger lawfully upon the company's train. *Railroad Co. v. Hagblad*, — Neb. —, 101 N. W. Rep. 1033. But see the same

risers and falls with the action of the water.¹ But in this respect the carrier has a right to assume that passengers will exercise at least ordinary care for their own safety.²

If insufficient light be provided,³ and a passenger is consequently injured, or if he sustains injury by stepping into a hole in the dock or wharf,⁴ the carrier must respond in damages as in the case of railroad carriers. But he cannot be held responsible for injuries received from obstructions on the wharf or vessel which were in plain view and could easily have been avoided by the passenger.⁵

So the carrier by water, when such becomes necessary, is

case on a later hearing, — Neb. —, 106 N. W. Rep. 1041.

1. *Mayor of St. John v. McDonald*, (Can.) 14 S. C. R. 1; *The City of Portsmouth*, 125 Fed. 264; *Mueller v. Ferry Co.*, 61 N. Y. Supp. 986, 46 App. Div. 560.

A space of two inches between the bow of a ferry boat and the ferry bridge was held not to be negligence on the part of a carrier where the evidence was virtually uncontradicted that the appliances, including the boat, bridge, windlass, cables, and slips, were the best known for such purposes, and were in general use; that it was impossible, under certain conditions of the tide, to so bring the bow of the boat and the bridge together as to make them level and leave no space between them; that the crowding of the passengers to the front lowered the front, and the flood tide always forced the stern up the stream, leaving such a space between bow and bridge which was unavoidable. *Duke v. Ferry Co.*, 29 N. Y. Supp. 739, 9 Misc. 268; *affirmed*, 145 N. Y. 640, 41 N. E. Rep. 88.

2. *Race v. Union Ferry Co.*, 138 N. Y. 644, 34 N. E. Rep. 280, 53 N. Y. St. Rep. 9, *reversing* 19 N. Y. Supp. 675; *Fogassi v. Railroad Co.*, 45 N. Y. Supp. 175, 17 App. Div. 286, *affirming* 13 Misc. 102, 34 N. Y. Supp. 116.

3. *Scanlan v. Tenney*, 72 Fed. 225.

4. *White v. Navigation Co.*, 36 Wash. 281, 78 Pac. Rep. 909. And where a passenger of a railroad company, having a through ticket to her destination by a connecting steamboat line, in passing over a wharf which belonged to the company and was used by it as a necessary passage-way to the steamer, and over which the passengers were directed to pass, stepped into a hole in the plank-ing of the wharf from which she received a severe injury, the wharf was treated as a part of the company's road, and it was held liable for the injury. *Knight v. The Railroad*, 56 Me. 234.

5. *Strutt v. Railroad Co.*, 45 N. Y. Supp. 728, 18 App. Div. 134. (Passenger stumbled over hose on wharf;) *Seddon v. Bickley*, 153 Pa. St. 271, 25 Atl. Rep. 1104,

bound to provide a suitable gang plank over which his passengers may pass,⁶ and to see that it is properly secured before the passengers are invited to use it.⁷ Whether the gang plank should be protected by guard rails will depend upon all the attending circumstances. But where a boat was crowded, and the gang plank was narrow and rested at a sharp angle on the wharf, it was held that a custom to dispense with railings, ropes, or guards of any kind could not be upheld.⁸ So the roadways⁹ and bridges¹⁰ leading to the wharf or boat must be maintained in a reasonably safe condition, and if a roadway is steep, adequate facilities must be provided for keeping teams from running back on one another.¹¹ But where a passenger failed to avail himself of the arrangements provided by the carrier for a safe boarding or landing, and knowingly took a more dangerous method, it was held that he was chargeable with such contributory negligence as would bar him from the right to a recovery for an injury thereby sustained.¹²

(passenger stumbled over gang plank in usual place on vessel.)

6. *Croft v. Steamship Co.*, 20 Wash. 175, 55 Pac. Rep. 42; *Bartnik v. Railroad Co.*, 55 N. Y. Supp. 266, 36 App. Div. 246; *Hrebrik v. Carr*, 29 Fed. Rep. 289.

If a passenger is invited to leave a ferry boat when it is assumedly fast to the float, and no gang plank is provided, he is justified in believing that the boat will remain against the float, and that the designated pathway will continue safe for its purpose. In such case negligence of the carrier will be inferred from a backward impulse of the boat which the duty of exercising reasonable diligence for the safety of its passengers renders it incumbent upon the carrier to avoid; or, if unable to avoid, to explain by satisfactory evidence. *Spero v. Railroad Co.*, 47 N. Y. Supp. 1093, 21 Misc. 683.

7. *Croft v. Steamship Co.*, 20 Wash. 175, 55 Pac. Rep. 42; *Dougherty v. Railroad Co.*, 86 N. Y. Supp. 746.

8. *Burrows v. Lownsdale*, 133 Fed. 250, 66 C. C. A. 650; *Miller v. Steamboat Co.*, 73 Hun, 150; 25 N. Y. Supp. 924.

9. A ferry company, which habitually permits passengers to use the roadway designed for vehicles, must keep that roadway in an equally "reasonably safe" condition for their use as the sidewalk provided for foot passengers. *Wolf v. Brooklyn Ferry Co.*, 66 N. Y. Supp. 298, 54 App. Div. 67.

10. *Patton v. Pickles*, 50 *La. Ann.* 857, 24 So. Rep. 290.

11. *Townsend v. City of Boston*, 187 Mass. 283, 72 N. E. Rep. 991.

12. *Plant Inv. Co. v. Cook*, 85 Fed. 611, 29 C. C. A. 377; *Hoboken Ferry Co. v. Feiszt*, 58 N. J. Law 198, 35 Atl. Rep. 299.

Where a passenger receives an injury, while embarking or disembarking, by the careless handling of the ship's appliances, the carrier will be liable although the accident may have been partly due to the action of the water.¹³

The degree of care required of carriers by water in providing proper wharves, approaches and station facilities is the same as that already stated in respect of railroad companies.¹⁴

Sec. 943. (§ 522.) Power of carriers to adopt regulations as to admission into their stations and depots.—As there would be an inconsistency in requiring railway carriers to see that their depots and station grounds are rendered safe and reasonably comfortable for their passengers, without at the same time allowing to them the right to adopt and enforce regulations reasonable and necessary to accomplish this end, the law has very justly been held to permit them to impose such restrictions upon third persons, as to admission to the grounds thus appropriated, as the convenience of their business and the comfort of their passengers may be thought to require. Such regulations, however, must be general and impartial, and no superintendent or other officer of the road will be justified in arbitrarily ordering a person to leave such premises merely because such superintendent or officer has become offended at his conduct to himself, or for a supposed violation of some rule of the company of which the person had never in fact been guilty.¹⁵ And as such companies are empowered to take

13. *Louisville & J. Ferry Co. v. Nolan*, 135 Ind. 60, 34 N. E. Rep. 710. 15. *Commonwealth v. Power*, 7 Met. 596.

In this case a passenger on a ferry boat was injured by the falling of a stanchion which was knocked down by the gang plank that had been run out to land the passengers, and had been brought in contact with the stanchion by the falling away of the boat. The carrier was held liable.

14. *Bacon v. Steamboat Co.*, 90 Me. 46, 37 Atl. Rep. 328.

Thus in *People v. McKay*, 46 Mich. 439, where a passenger had been ejected from the depot because he spat on the floor, the station-keeper was held properly convicted of assault and battery. "It is absurd to claim," said Campbell, J., "that the traveling community are bound to govern their behavior by the whims of an obstinate station-house keeper, or to leave the room whenever he

precautionary measures for the good order and correct management of their business, the presumption will be that their reasonable rules and regulations are for the public advantage, and do not conduce to the prejudice of particular individuals. Thus, where the frequenting of hotel-keepers or their servants at such depots, in order to solicit patronage to go to their hotels, or of peddlers or others seeking to do business with passengers, is an annoyance to the passengers or occasions an interruption or hindrance to the company's business, the superintendent or other officer in charge may make a regulation to prohibit,¹⁶ or to keep it within proper bounds.¹⁷ So he may exclude persons who come to do business with passengers, such as selling or soliciting orders for lunches.¹⁸ If, after notice of such prohibition, such persons enter upon the forbidden ground, and refuse to leave when ordered to do so, they may be forcibly ejected by the company.¹⁹

Railway companies may also adopt reasonable regulations regulating the conduct of the passengers themselves while within the depot or on the station grounds. Thus a regulation prohibiting passengers awaiting the arrival or departure of trains from going to sleep in the station waiting rooms, or lying down on the benches, is not, in a legal sense, unreasonable.²⁰ And a carrier may adopt a regulation requiring that white and colored passengers shall occupy different waiting rooms, provided the accommodations in each room are in all respects equal.²¹

Sec. 944. Same subject—Right of railway companies to exclude all but certain favored hackmen from their grounds—

thinks proper to drive them out. (1897) App. Cas. 479, 66 L. J. P. C. 81.

They are invited by the railroad company, and are entitled to remain there so long as they have occasion to do so, and commit no offense against the good order of the place and the reasonable regulations made to govern it."

16. *Commonwealth v. Power*, *supra*; *Hall v. Power*, 12 Met. 482; *Harris v. Stevens*, 31 Vt. 79.

17. *Perth Committee v. Ross*, 21. *Smith v. Chamberlain*, 3.

18. *Fluker v. Railroad Co.*, 81 Ga. 461.

19. *Commonwealth v. Power*, *supra*; *Hall v. Power*, 12 Met. 482; *Harris v. Stevens*, 31 Vt. 79.

20. *Railway Co. v. Motes*, 117 Ga. 923, 43 S. E. Rep. 990, 62 I. R. A. 507, 97 Am. St. Rep. 223.

21. *Smith v. Chamberlain*, 3.

Courts which uphold such right.—All the courts agree that a railway company cannot prohibit the entrance of the passenger's own carriage to the station grounds to carry him or his goods to or from the train, and that it cannot prohibit the entrance of the carriage of a hackman which, by contract made elsewhere with the passenger, has become the carriage of the passenger *pro hac vice*.²² But there is a sharp division of authority on the right of a railroad company to grant an exclusive right to certain hackmen to solicit patronage in its station or grounds, and exclude all other hackmen from exercising a similar privilege. The right to grant such an exclusive privilege has been upheld by the courts of England,²³ by the Supreme Court of the United States,²⁴ and by the Supreme Courts of Connecticut,²⁵ Georgia,²⁶ Massachusetts,²⁷ Minnesota,²⁸ New Hampshire,²⁹ New York,³⁰ Ohio,³¹ Rhode

S. C. 529, 17 S. E. Rep. 371, 19 L. R. A. 740.

22. *Griswold v. Webb*, 16 R. I. 649, 19 Atl. Rep. 143, 7 L. R. A. 302; *Railroad Co. v. Warren*, 64 N. Y. Supp. 781, 31 Misc. 571; *State v. Union Depot Co.*, 71 Ohio St. 379, 73 N. E. Rep. 633, 68 L. R. A. 792; *Godbout v. St. Paul Union Depot Co.*, 79 Minn. 188, 81 N. W. Rep. 835, 47 L. R. A. 532; *Donovan v. Pennsylvania Co.*, 199 U. S. 279.

23. *Barker v. The Railroad*, 18 Com. B. 46; *Barret v. The Railway*, 1 Com. B. (N. S.) 423; *Painter, Ex parte*, 2 *id.* 702.

24. *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 26 Sup. Ct. R. 91, *affirming* 124 Fed. 1016, 60 C. C. A. 168; *s. c.* 120 Fed. 215, 57 C. C. A. 362, 61 L. R. A. 140, *modifying* 116 Fed. 907.

25. *Railroad Co. v. Scovill*, 71 Conn. 136, 41 Atl. Rep. 246, 42 L. R. A. 157, 71 Am. St. Rep. 159.

26. *Kates v. Cab Co.*, 107 Ga. 636, 34 S. E. Rep. 372, 46 L. R. A. 431.

27. *Old Colony R. Co. v. Tripp*, 147 Mass. 35; *Railroad Co. v. Brown*, 177 Mass. 65, 58 N. E. Rep. 189, 52 L. R. A. 418; *Railroad Co. v. Sullivan*, 177 Mass. 230, 58 N. E. Rep. 689.

28. *Godbout v. St. Paul Union Depot Co.*, 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532.

29. *Hedding v. Gallagher*, 72 N. H. 377, 57 Atl. Rep. 225, 64 L. R. A. 811, *overruling* 70 N. H. 631, 47 Atl. Rep. 614 and 69 N. H. 650, 45 Atl. Rep. 96, 76 Am. St. Rep. 204.

30. *Brown v. Railroad Co.*, 75 Hun, 355, 27 N. Y. Supp. 69; *affirmed*, 151 N. Y. 674, 46 N. E. Rep. 1145; *Railroad Co. v. Sheeley*, 27 N. Y. Supp. 185; *Railroad Co. v. Flynn*, 74 Hun, 124, 26 N. Y. Supp. 859; *Railroad Co. v. Warren*, 64 N. Y. Supp. 781, 31 Misc. 571.

31. *State v. Union Depot Co.*, 71 Ohio St. 379, 73 N. E. Rep. 633; *Snyder v. Depot Co.*, 19 O. C. C. 368.

Island,³² and Virginia.³³ The principle underlying these decisions is stated by the Supreme Court of the United States,³⁴ as follows: "We cannot say that that arrangement was either unnecessary, unreasonable or arbitrary; on the contrary, it is easy to see how, in a great city and in a constantly crowded railway station, such an arrangement might promote the comfort and convenience of passengers arriving and departing, as well as the efficient conduct of the company's business. The record does not show that the arrangement referred to was inadequate for the accommodation of passengers. But if inadequate, or if the Transfer Company was allowed to charge exorbitant prices, it was for passengers to complain of neglect of duty by the railroad company, and for the constituted authorities to take steps to compel the company to perform its public functions with due regard to the rights of passengers. The question of any failure of the company to properly care for the convenience of passengers was not one that, in any legal aspect, concerned the defendants as licensed hackmen and cabmen. It was not for them to vindicate the rights of passengers. They only sought to use the property of the railroad company to make profit in the prosecution of their particular business. A hackman, in nowise connected with the railroad company, cannot, of right and against the objections of the company, go upon its grounds or into its stations or cars for the purpose simply of soliciting the custom of passengers; but, of course, a passenger upon arriving at the station, in whatever vehicle, is entitled to have such facilities for his entering the company's depot as may be necessary." . . .

"But the right of the railroad company as abutting owner, and the rights of passengers are not, in their nature, para-

32. *Railroad Co. v. Bork*, 23 R. Co., 199 U. S. 279, 26 Sup. Ct. R. I. 218, 49 Atl. Rep. 965. 91, *affirming* 124 Fed. 1016, 60

33. *Railway Co. v. Old Dominion Baggage Co.*, 99 Va. 111, 37 C. C. A. 168; s. c. 120 Fed. 215, 57 C. C. A. 362, 61 L. R. A. 140, S. E. Rep. 784, 50 L. R. A. 722. *modifying* 116 Fed. 907.

34. *Donovan v. Pennsylvania*

mount to the rights of others of the general public to use the sidewalk in question in legitimate ways and for legitimate purposes. Licensed hackmen and cabmen, unless forbidden by valid local regulations, may, within reasonable limits, use a public sidewalk in prosecuting their calling, provided such use is not materially obstructive in its nature, that is, of such exclusive character as, in a substantial sense, to prevent others from also using it upon equal terms for legitimate purposes. Generally speaking, public sidewalks and streets are for use by all, upon equal terms, for any purpose consistent with the object for which such sidewalks and streets are established; subject of course to such valid regulations as may be prescribed by the constituted authorities for the public convenience; this, to the end that, as far as possible, the rights of all may be conserved without undue discrimination."³⁵

Sec. 945. (§ 523.) Same subject—Courts which deny such right.—Other courts, however, deny that this right of a railway company to grant exclusive privileges in soliciting custom within its station to certain favored hackmen exists. The ground that these courts stand upon is that monopoly prices are always higher than competitive prices, and the exploitation of the passenger should not be permitted by the creation of this monopoly. As has been said in a leading case³⁶ upon this subject, "The question is one that affects not only the excluded hackmen, it affects the interests of the public. The upholding of the grant of this exclusive privilege would prevent competition between rival carriers of passengers, create a monopoly in the privileged hackmen, and might produce

³⁵. See on the question of the use of public sidewalks or streets by hackmen, *Pennsylvania Co. v. City of Chicago*, 181 Ill. 289, 54 N. E. Rep. 825, 53 L. R. A. 223, affirming 73 Ill. App. 345.

the privilege of hackmen soliciting custom in railroad stations, see, *Cosgrove v. City Council of Augusta*, 103 Ga. 865, 31 S. E. Rep. 445, 42 L. R. A. 711.

On the right of a city council to interfere by ordinance with

³⁶. *State v. Reed*, 76 Miss. 211, 24 So. Rep. 308, 43 L. R. A. 134.

inconvenience and loss to persons traveling over the railroad, or those having freights transported over it, in cases of exclusion of drays and wagons from its grounds other than those owned by the person having the exclusive right to enter the railroad's depot grounds. To concede the right claimed by the railroad in the present case would be, in effect, to confer upon the railroad company the control of the transportation of passengers beyond its own lines, and, in the end, to create a monopoly of such business, not granted by its charter, and against the interests of the public."

This view of the law seems to prevail in Indiana,³⁷ Kentucky,³⁸ Michigan,³⁹ Missouri,⁴⁰ Mississippi,⁴¹ Montana,⁴² and possibly Illinois.⁴³

But even under this view, a railway company has the right to designate the place abutting on the platform where competing hackmen shall stand their vehicles while awaiting the arrival and departure of trains, and where they shall receive and discharge passengers and baggage.⁴⁴

Sec. 946. Power of railway company to grant exclusive access to its terminal wharf to favored steamboat line.—An analogous question to that just considered is whether a railroad company, having a terminal wharf on a navigable stream or other body of water, has a right to allow one steamboat line exclusive access to that wharf to the prejudice of competing

37. *Railroad Co. v. Doan*, 153 Ind. 10, 53 N. E. Rep. 937, 45 L. R. A. 427. 38. *Mont.* 419, 24 Pac. Rep. 209, 18 Am. St. Rep. 745.

39. *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. Rep. 15. 40. *Pennsylvania Co. v. City of Chicago*, 181 Ill. 289, 54 N. E. Rep. 825, 53 L. R. A. 223, affirming 73 Ill. App. 345, seem to favor this view, although the point was not directly involved in the case.

41. *Kalamazoo Hack Co. v. Sootsma*, 84 Mich. 194, 47 N. W. Rep. 667; *Cole v. Rowen*, 88 Mich. 219, 50 N. W. Rep. 138, 13 L. R. A. 848. 42. *Lucas v. Herbert*, 148 Ind. 64, 47 N. E. Rep. 146, 37 L. R. A. 376; *Cole v. Rowen*, 88 Mich. 219, 50 N. W. Rep. 138, 13 L. R. A. 848; *Smith v. Railroad Co.*, 149 Pa. St. 249, 24 Atl. Rep. 304.

43. *Lucas v. Herbert*, 148 Ind. 64, 47 N. E. Rep. 146, 37 L. R. A. 376; *Cole v. Rowen*, 88 Mich. 219, 50 N. W. Rep. 138, 13 L. R. A. 848; *Smith v. Railroad Co.*, 149 Pa. St. 249, 24 Atl. Rep. 304.

44. *Lucas v. Herbert*, 148 Ind. 64, 47 N. E. Rep. 146, 37 L. R. A. 376; *Cole v. Rowen*, 88 Mich. 219, 50 N. W. Rep. 138, 13 L. R. A. 848; *Smith v. Railroad Co.*, 149 Pa. St. 249, 24 Atl. Rep. 304.

45. *Railway Co. v. Langlois*, 9 Pa. St. 249, 24 Atl. Rep. 304.

steamboat lines. The majority of courts seem to hold that such an exclusive privilege cannot be granted,⁴⁵ but other courts seem to entertain the opposite view.⁴⁶ The courts which maintain that such an exclusive privilege cannot be granted do so on the ground that the existence of such a right would lead to the legalizing of a monopoly.

4. *Duty to keep roads, vehicles, etc., in repair.*

Sec. 947. (§ 524.) Duty as to roads when provided by themselves.—Carriers who provide their own roads are bound to exercise the same degree of care in putting and keeping them in a safe condition as in the selection of and attention to the vehicles which they use upon them; and especially is this so in regard to railroads, the least defect in which may be attended by the most fatal consequences to passengers. As it is sometimes expressed, it is the imperative duty of such carriers to provide themselves not only with road-worthy vehicles, but with vehicle-worthy roads; and when an accident occurs by which the passenger has suffered an injury upon a road for the condition of which the carrier is responsible, it will be as necessary for him, in order to exculpate himself, to show that his road was in complete order, as to show that his

45. Indian River Steamboat Co. v. East Coast Transportation Co., 28 Fla. 387; Macon, etc., R. Co. v. Graham & Ward, 117 Ga. 555; West Coast Naval Stores Co. v. Railroad Co., 121 Fed. 645, 57 C. C. A. 671. While a riparian owner on a navigable stream may construct a wharf and maintain it for his own exclusive use, if he permits others to generally and habitually use it, and such wharf commands the exclusive means of communication with the waterway, it becomes impressed with a public interest and cannot, by being purchased or leased by a particular carrier, be trans-

formed into private property so as to exclude the public or other carriers from using it on the payment of reasonable wharfage charges. Weems Steamboat Co. v. People's Steamboat Co., 141 Fed. 454.

46. Alexandrie Bay Steamboat Co. v. Railroad Co., 45 N. Y. Supp. 1091, 18 App. Div. 527; Ilwaco Ry. & Nav. Co. v. Oregon, etc. Ry. Co., 57 Fed. 673, 6 C. C. A. 495, 15 U. S. App. 173, *reversing* 51 Fed. 611. (But in this case the Oregon Short Line & Nav. Co. controlled both the railway and the steamship line connecting with the wharf in question, so that it is

vehicle was without defect, or that if defective it was so without his knowledge, and in such a manner that the fact could not have been discovered by inspection. The highest degree of care will therefore be required of railway companies in the construction of their road-beds, without stability in which the necessary superstructure must necessarily be infirm.⁴⁷ But the same qualification as to the diligence to be required of such companies, in regard to the character of their vehicles, applies with the same force to the diligence and care which are required to be exercised in regard to their roads, and that is that such a degree of care, diligence and expense will not be required of them as to make the business of the carriage of passengers wholly impracticable, or so responsible and expensive as to drive from it all prudent men.⁴⁸

questionable whether it is opposed to the cases cited in the preceding note.)

47. *Virginia, etc. R. R. v. Sanger*, 15 Gratt. 130; *McElroy v. The Railroad*, 4 Cush. 400; *Oakland R. R. v. Fielding*, 48 Penn. St. 320; *O'Donnell v. The Railroad*, 59 *id.* 239; *Railway Co. v. Watson's Adm'r*, 93 Ky. 654, 21 S. W. Rep. 244, 40 Am. St. Rep. 211, 19 L. R. A. 310; *Libby v. Railroad Co.*, 85 Me. 34, 26 Atl. Rep. 943, 20 L. R. A. 812; *Railroad Co. v. Kuhn*, 107 Tenn. 106, 64 S. W. Rep. 202, citing *Hutch. on Carr.*; *Davis v. Railroad Co.*, 93 Wis. 470, 67 N. W. Rep. 16, 57 Am. St. Rep. 935, 33 L. R. A. 654; *Gleeson v. Railroad Co.*, 140 U. S. 435, 11 Sup. Ct. R. 859; *Cain v. Railroad Co.*, — S. Car. —, 54 S. E. Rep. 244.

48. *Pittsburg, etc. R. R. v. Thompson*, 56 Ill. 138. In *Grand Rapids, etc. R. Co. v. Huntley*, 38 Mich. 545, *Campbell, C. J.*, said: "The road, if in such a condition

as would be regarded as safe by railroad men of usual intelligence and experience, could not be complained of for any possible deficiencies which would not be regarded by competent persons as existing."

In *Railroad Co. v. Crumpler*, 122 Fed. 425, 59 C. C. A. 51, the following instruction of the trial court to the jury was held substantially correct: "That while the duty rested upon the defendant company, as a carrier of passengers, to exercise the highest practical care to provide a safe road-bed, sound ties, and strong rails securely laid, and safe cars wherewith to transport the plaintiff, and that if it was guilty of negligence in any one or all of these particulars the plaintiff might recover, provided the injury of which he complained was the direct result of one of such acts of negligence, yet that the duty resting upon the defendant as a carrier of passengers did not

Sec. 948. Same subject—Not liable for defect in road caused by accident which could not have been foreseen—Storms, floods, snow-slides, etc.—But the carrier, in maintaining its roadbed and tracks, is not required to provide against extraordinary and inevitable casualties, such as unprecedented storms, floods and the like, which cannot reasonably be foreseen and anticipated by that degree of engineering skill and experience required in the prudent construction of its road. And the test of the carrier's liability is not whether it exercised such particular foresight as afterwards appears might have averted the accident, but whether it exercised that degree of care which very cautious and prudent persons engaged in the same business would have exercised under the circumstances as they appeared at the time.⁴⁹ Thus where a railroad company was sued for an injury incurred by the plain-

compel it to exercise all the care and diligence the human mind could conceive of, nor such care as would render the transportation of passengers free from any possible danger to them, nor such as would drive the carrier out of business; that the carrier, for instance, was not required to lay iron or granite cross-ties simply because such ties were less liable to decay, and hence safer than wood; that it was required to exercise the highest degree of practical care, diligence, and skill, but that there were some casualties which human sagacity could not guard against and foresee, and that every passenger must make up his mind to meet the risks, incident to the mode of travel which he adopts, that cannot be avoided by the highest degree of care and skill in the preparation and management of the means of conveyance, and to submit to the privations and re-

straints and conform to the provisions which might be made and enforced for his safety and protection."

49. *Libby v. Railroad Co.*, 85 Me. 34, 26 Atl. Rep. 943, 20 L. R. A. 812; *Railway Co. v. Chalfoux*, (Can.) 22 S. C. R. 721; *Railroad Co. v. Pilgrim*, 9 Colo. App. 86, 47 Pac. Rep. 657; *Railroad Co. v. Andrews*, 11 Colo. App. 204, 53 Pac. Rep. 518; *Railroad Co. v. Marshall*, 90 Va. 836, 20 S. E. Rep. 823.

In *Railway Co. v. Chalfoux*, *supra*, a rail broke on account of the sudden action of frost and a great variation in temperature. The carrier was held not liable.

In *Railroad Co. v. Pilgrim*, *supra*, and *Railroad Co. v. Andrews*, *supra*, railroads were held not liable for accidents due to snow slides in regions where they never had occurred before.

In *Railroad Co. v. Marshall*, *supra*, the railroad was held not

tiff as a passenger, in consequence of the washing away of a part of its track by an extraordinary flood, it being shown that the track had been constructed about five years before the accident, and during that time had withstood all ordinary floods, and that, in the particular instance, the accident had occurred to the train whilst running at night, and when its officers were wholly in ignorance of the damage to the track, the court saw in the case no evidence of negligence, but argued, from the fact that the road had resisted the action of ordinary storms for so long a time, that it had been constructed with ordinary care.⁵⁰ And in another case it was held that a railway company was required to construct its road so as to be sufficient to resist all such violence of weather as might be reasonably expected, even though rarely, to occur in the climate or locality through which it ran, and that the fact that it had given way to any such violence would be *prima facie* evidence of its insufficiency; but that where the company had employed skilful engineers, and used all ordinary precautions in its construction, and the break was caused by an unusual storm, it was held that the jury, to which the case was submitted upon the question of negligence, were justified in their verdict for the company.⁵¹

Sec. 949. (§ 526.) Same subject—Liability for unsound rails, defective switches, etc.—So any carelessness or negligence in the use of unsound rails, ill-constructed switches, or any of the subsidiary appointments of the road, will make such carriers liable for any injury to a passenger which can be traced to such an imperfection or defect, and the cases are

liable for the giving way of an embankment due to the floods from an unprecedented rain.

But accidents due to excavations in the railroad right of way (*Smedley v. Railway Co.*, 184 Pa. St. 620, 39 Atl. Rep. 544) or to damage from floods in a locality noted for heavy rains and floods (*Cobb v. Railway Co.*, 149 Mo.

609, 50 S. W. Rep. 894) can hardly be said to be inevitable, and the carrier is liable for consequent injuries to passengers.

50. *Withers v. The Railway Co.*, 27 L. J. Exch. 417; s. c. 1 F. & F. 165.

51. *Great Wes. Railway v. Braid*, 1 Moore, P. C. (N. S.) 101.

numerous in which their liability has been made to depend upon their inattention to the unfitness of such portions of their roads. And if an accident, from which an injury results to the passenger, be attributable to a defect in any of these things, whether a part of the road itself or used in connection therewith and constituting a part of the apparatus for his conveyance, the carrier will be liable if, by the strictest diligence, it might have been discovered or known and remedied by its agents.⁵²

52. *McElroy v. The Railroad*, 4 Cush. 400; *Reed v. The Railroad*, 56 Barb. 493; *Toledo, etc. R. R. v. Apperson*, 49 Ill. 480; *Chicago, etc. R. R. v. Taylor*, 69 *id.* 461; *Curtis v. The Railroad*, 20 Barb. 282, 18 N. Y. 534; *Baltimore, etc. R. R. v. Worthington*, 21 Md. 275; *Taylor v. Day*, 16 Vt. 566; *Nashville, etc. R. R. v. Messino*, 1 Sneed, 220; *Fletcher v. The Railroad*, 1 Allen, 9; *Eaton v. The Railroad*, 11 *id.* 500; *Railway Co. v. Mitchell*, 57 Ark. 418, 21 S. W. Rep. 883; *Whittlesey v. Railway Co.*, 121 Iowa, 597, 90 N. W. Rep. 516, 97 N. W. Rep. 66; *Railroad Co. v. Sandusky*, 14 Ky. L. Rep. 767; *McCafferty v. Railroad Co.*, 193 Pa. St. 339, 44 Atl. Rep. 435, 74 Am. St. Rep. 690; *Nickles v. Railway Co.*, — S. Car. —, 54 S. E. Rep. 255.

As to a railroad's liability for rotten ties, see, *Railway Co. v. Watson's Adm'r*, 93 Ky. 654, 21 S. W. Rep. 244, 19 L. R. A. 310, 40 Am. St. Rep. 211; *Davis v. Railroad Co.*, 93 Wis. 470, 67 N. W. Rep. 16, 57 Am. St. Rep. 935, 33 L. R. A. 654.

It is not enough that the track is "apparently" in good and safe condition. If there are defects rendering it unsafe, which might

be discovered by the exercise of care and skill, it is the duty of the carrier to discover them and to thereby avoid danger to its passengers. *Railway Co. v. Lewis*, 145 Ill. 67, 33 N. E. Rep. 960, *affirming* 48 Ill. App. 274.

In *McCafferty v. Railroad Co.*, 193 Pa. St. 339, 44 Atl. Rep. 435, 74 Am. St. Rep. 690, it appeared that the accident was caused by a broken rail. The rail had been in use for 16 years as the outside rail on a sharp curve, and had been worn by the flanges of the car wheels so that its weight had been reduced from 60 to 55 pounds per yard. It had been broken some months before the accident, and had been repaired by the use of splices or side bars, and admittedly it was greatly weakened by both the wear and the fracture. In view of this testimony the court said it was idle to say that the case could have been withdrawn from the jury.

In *Railway Co. v. Watson's Adm'r*, 93 Ky. 654, 21 S. W. Rep. 244, 19 L. R. A. 310, 40 Am. St. Rep. 211, where the plaintiff sought to show that the ties at the place where the accident occurred were rotten, the court held that the condition of the

Sec. 950. (§ 527.) Same subject—No liability when injury caused by a stranger.—In such cases, however, the negligence of the carrier is the gist of the action; and where the misfortune has been caused by the negligence or trespass of a stranger, for whose acts the company was not responsible, and no negligence in anticipating the act or in preventing its consequences can be charged to the carrier, it will not be held accountable. Thus where the track of the road had been in good order up to the time of the mishap, which was caused by the displacement of some of its rails by some evil-disposed person at night, and immediately before the train's arrival at the spot, with a reckless design to cause damage to the road, and under such circumstances that the agents of the road, with

road bed at the place of the accident (when there was some evidence tending to show that the accident was caused by a defective track) or in the immediate vicinity could be shown to prove the condition of the track at such place.

On rehearing in *Whittlesey v. Railway Co.*, 121 Iowa, 597, 90 N. W. Rep. 516, 97 N. W. Rep. 66, the court said: "Generally speaking, proof that a particular rail was defective could not be made out by showing that other rails had become broken. But another question altogether is presented when, as here, it is sought to show by proof of repeated breakings that all the rails were defective in the sense that they were insufficient in size and weight to bear up the engines and trains in use. Certainly, if it should be made to appear that the rails in use were so light, and the trains operated so heavy, that in extreme weather frequent breakings occurred, notwithstanding

ing which the defendant continued to so operate its road, there can be found very little substantial reasons for saying that one injured by the derailment of a train caused by one of the rails becoming thereby broken could not charge negligence, and, in making proof thereof, ought to be restricted to the condition of the particular rail which happened to be the immediate cause of the accident. The duty of the defendant was to construct and maintain a track sufficient for the operation of its trains thereover, and in this respect the highest degree of care was imposed upon it. This is elementary. See 6 Cyc. 619, and cases cited. Now, the charge made being that the track was not so constructed or maintained, we think that evidence of the breaking of rails at other nearby points on the line of the road, where the conditions generally were the same as at the point of the accident, was competent."

the utmost care, could not have known of the danger, it was adjudged that the company could not be held liable.¹

But since the duties resting upon the carrier's servants are required to be performed by the servants themselves, if such a duty is performed by a third person, either at the request of a servant or with his acquiescence, the act will be considered as that of the servant himself, and the carrier will be liable for any injury resulting from its negligent performance. So, it is the duty of the servant to prevent officious intermeddling with his duties, when such intermeddling is known to him, and the fact that an intruder is not requested by the servant to perform a certain service cannot excuse the master for its negligent performance, where the servant could have prevented the intruder from undertaking the service. To hold otherwise

1. *Deyo v. Railroad Co.*, 34 N. Y. 9. See also, *Railroad Co. v. Herold*, 74 Md. 510, 22 Atl. 323, 14 L. R. A. 75.

In *Fredericks v. Railroad Co.*, 157 Pa. St. 103, 27 Atl. Rep. 689, 22 L. R. A. 306, the plaintiff's intestate was sitting in a passenger car on the main track of the defendant's railroad. A short way from the car there was a side track inclining toward and connecting with the main track by a switch. The defendant's servants had run several freight cars onto the side track and, intending that they should remain there for a time, fixed securely the brakes and opened the switch so that in case the freight cars should by any chance loosen and run toward the main track, they would run through the open switch and upon the ground. While so secured, a mischievous stranger procured a coupling pin and bent open the brakes, connected the side track with the

main track by throwing the switch, and there being nothing to retard their movement, the freight cars rolled of their own momentum upon the main track, crashed into the train in which the plaintiff's intestate was sitting, causing his death. In an action to compel the company to respond in damages for the alleged wrongful death, the court, in its opinion, said: "The question in this case is whether the defendant company was bound, in the exercise of its duty of extraordinary care, to take extraordinary precautions against the grossly criminal acts of strangers. . . . There is no duty resting upon any person to anticipate wrongful acts in others, and to take precautions against such acts; much less the duty of presuming that another may be a wrongdoer. The rule that the carrier is bound to exercise the highest degree of care that is possible to human foresight and

would be to abrogate the rule governing the carrier's liability.²

Sec. 951. (§ 528.) Same subject—Liability for not discovering defect.—It therefore sometimes becomes important to ascertain whether a defect previously existed to which the accident is to be attributed, and which the company had the opportunity to discover and to remedy, or whether the accident occurred without any previously existing defect, such as it would have been negligence in the company not to discover. If, for instance, a rail apparently sound should, in the very act of being passed over by the train, break and occasion an injury without negligence on the part of the company in not having previously discovered its weakness, the company would not be liable; but if it had been broken before the accident by another train, and time had been afforded the company to discover the fact, it would be obnoxious to the charge of negligence and would be liable to the injured passenger.³ Both the questions arose in the case of *McPadden v. The Railroad*,⁴ the

prudence, does not require a construction that will make the carrier an insurer against accidents; nor the prevention of accidents by the employment of means, which, if the accident could have been foreseen, might have been used to prevent it; nor for the wrongful acts of strangers unless the carrier was remiss in not discovering them in time to avert the injury; nor for an impracticable character or extent of precaution which could not be observed without so ruinous a cost as to destroy the business; and in all cases the liability is only such as results from negligence. If the purpose and the act were criminal, and were those of a stranger, and could not have been foreseen by any human skill or knowledge, the duty of precaution against such acts does not arise,

and negligence does not result from the want of such precautions."

2. *Dimmitt v. Railroad Co.*, 40 Mo. App. 654, citing *Hutch. on Carr.*

3. Where an accident happens because of the breaking of a car-wheel, not attributable to the fault of the company, the latter is not liable because a passenger had told the conductor that he had heard an unusual sound and felt a jar, and the conductor made such examination as he could without stopping the train, though if it had been stopped the broken wheel would have been discovered. *Frelson v. Southern Pac. Co.*, 42 La. Ann. 673, cited in 7 So. Rep. 800 as *Irelson v. Southern Pac. Co.*

4. 44 N. Y. 478.

contention of the plaintiff being that the rail, the breaking of which caused the accident, had really been broken by another train which had run over it a few minutes before the one in which he was a passenger. But it was held that even if that were so, sufficient time and opportunity had not been given the road to discover and repair the defect before the happening of the accident from which the plaintiff was the sufferer.

Sec. 952. (§ 529.) Responsibility for not adopting useful improvements which may promote the safety of the passenger.

—Carriers of passengers may also become chargeable with negligence by a failure to adopt such known and generally used inventions and improvements, in the manner of the construction of their vehicles, as conduce to the safety of passengers by their modes of conveyance; and the same requirement is made as to the construction and general equipment of their roads of those carriers who build and are responsible for their condition.⁵ But while the law demands for the safety of the passenger the utmost care, it will not hold the carrier accountable for the use of every possible means to prevent injury which the highest scientific skill might have brought to bear, nor for the employment of every device which ingenuity might

5. *Smith v. The Railroad*, 19 N. Y. 127, 6 Duer, 225; *Hegeman v. The Railroad*, 16 Barb. 353, 13 N. Y. 9; *Caldwell v. The Steamboat Co.*, 47 N. Y. 282; *Baltimore, etc. R. R. v. The State*, 29 Md. 252; *Meier v. The Railroad*, 64 Penn. St. 225; *Nashville, etc. R. R. v. Messino*, 1 Sneed, 220; *Nashville, etc. R. R. v. Elliott*, 1 Cold. 611; *Costello v. The Railroad*, 65 Barb. 92; *Unger v. The Railroad*, 51 N. Y. 497; *Taylor v. The Railway*, 48 N. H. 304; *Toledo, etc. R. R. v. Conroy*, 68 Ill. 560; *Jackson v. The Railway*, L. R. 2 Com. P. D. 125.

tween the railings on the rear platform of a passenger car in a mixed train is a question for the jury. *Newton v. Railroad Co.*, 80 Hun, 491, 30 N. Y. Supp. 488.

There is evidence that a step on a stage coach is defective, sufficient to make the question of negligence one of fact for the jury, when it is shown that the plaintiff was injured while entering defendant's stage by his foot slipping through the open step thereon; that both open and closed steps were in use on stages, and that closed steps were safer. *Frobisher v. Transportation Co.*, 81 Hun, 544, 30 N. Y. Supp. 1099.

Whether it is negligence not to have a chain across the space be-

have suggested, regardless of their expense as compared with the character and amount of his business, or of the difficulties of their adoption and application, or of their importance, or of the necessity for them in the particular business. Nor will he be held liable for failing to adopt an untried machine or mode of construction.⁶ In a case in which the question was as to the liability of a railway company, by reason of continuing to use a particular kind of switch instead of one of an improved pattern, by the employment of which it appeared that the accident would have been avoided, "undoubtedly," said the court, "this rule is to be applied with a reasonable regard to the ability of the company and the nature and cost of such improvements; but within its appropriate limits, it is a rule of great importance, and one which should be strictly enforced. A stronger case for the application of the rule than is here presented could scarcely arise. The improvement related to a part of the apparatus of the road which is a source of numerous accidents. Its utility was undoubted and the expense trifling. The defendants had themselves recognized its value. If the principle should ever be applied, therefore, it should be applied here. The defendants were clearly in default for permitting the short switch to remain in use upon the road, especially at a place where there was a somewhat unusual complication of switches."⁷

6. *Steinweg v. The Railway*, 43 N. Y. 123.

Thus there is no principle of law which requires a railroad company to furnish its road with new cars to transport passengers, or which makes it liable for using old ones. But whether new or old, it is required to keep them in good repair and fit for use so as not to endanger the safety of passengers. *Wormsdorf v. Railway Co.*, 75 Mich. 472.

A passenger carrier is not bound to adopt every new improvement

or to use on freight trains all the safety appliances used on passenger trains. *Oviatt v. Railway Co.*, 43 Minn. 300.

A carrier is required to use a headlight that is up to the standard of those in general use, and is reasonably adapted for the purpose for which they are intended; but the law does not require that such appliances shall be "of the most approved pattern in use." *Railway Co. v. Gullford*, 119 Ga. 523, 46 S. E. Rep. 655.

7. *Smith v. The Railroad*, *supra*.

Sec. 953. (§ 530.) Same subject.—And where the action was against a ferry company, to recover damages for an injury to a passenger upon one of its boats, through its alleged negligence, Colt, J., in delivering the opinion of the court, illustrated the distinction by saying: “The modes of conveyances in use by passenger carriers, both by land and water, vary as the exigencies of the traffic and its remunerative character require and justify. To require all carriers to adopt alike expensive provisions for the safety of passengers, without reference to the nature of their employment or the amount of their business, would be impracticable and absurd. It would be like requiring all public highways in the commonwealth to be kept in a like state of repair, without reference to the nature of the country through which they pass, or the amount of travel they accommodate. The different kinds of ferries in use vary from the rudest form of boat, drawn from shore to shore by ropes, propelled by oars or horse power or the current of the stream, with landing places on the banks, to those expensive steamboats which ply between populous districts, provided with every convenience of access from docks and ferry houses. It cannot be necessary, in order to protect themselves from liability, that all these different ferry-men should adopt those appliances which can be shown to be the safest, and which others in the same occupation use.”⁸

Sec. 954. Same subject.—Duty of railroad company to maintain “whip lashes” near overhanging structures or bridges.—By the weight of authority, it is the duty of rail-

8. *Le Barron v. The Ferry Co.*, 11 Allen, 312.

In *Hughes v. Steamboat Co.*, 31 N. Y. Supp. 1012, 11 Misc. 65, the plaintiff claimed he had been injured by falling on the stairs of defendant's steamboat. He introduced evidence to show that the steps were covered with polished and very slippery brass, but his testimony was not corroborated on

that point. On the contrary, the evidence tended to show that the brass covering was raised in stars to get an uneven surface, and the court refused to disturb a verdict in favor of the defendant.

On the question of the liability of a vessel for injuries arising out of latent defects in the vessel, see *The Oregon*, 133 Fed. 609, 68 C. C. A. 603.

road companies to so construct their overhead bridges, or other structures over their tracks, that those who have the right to be upon the tops of their freight trains may not be exposed to unnecessary risks or perils that can easily, and without any great outlay, be avoided. And if such a structure does expose those who have a right to be upon the tops of freight trains to unusual risk, the duty will devolve upon the railroad company to give verbal notice of the danger, or else to provide "whip lashes" for the purpose of affording timely warning of the approach of freight trains to the structure. Thus where a stockman who was passing over the tops of freight cars, after having attended his stock, was struck by a snow-shed which the railroad company had constructed over its track in such a manner that persons walking upright on the running boards of the cars could not safely pass beneath it, it was held that in failing to give him warning, either verbally or by "whip lashes" or other equipment, of the approach of the train to the structure, the company was guilty of negligence and was therefore liable for the injury.⁹

Sec. 955. Duty of railroad company to maintain fences along its right of way.—The obligation owed by a railroad company to its passengers requires of its employees in charge of its trains a faithful watchfulness to prevent accidents by collision with animals which may wander upon its track. And if such watchfulness is not sufficient to guard against the danger, and a fence will render the track more safe from the intrusion of animals, the company's obligation will require it to adopt the more effective precaution. If the conditions are such in respect to animals wandering upon its track that the want of a proper fence increases the dangers of railroad travel, and an accident results occasioning injury to a passenger, the railroad company will be liable for such injury, although it may owe no duty to the adjacent land owner or to the owner of the animals

9. *Saunders v. Southern Pac.* 56 Fed. 451, 5 C. C. A. 551, 12 U. S. Co., 13 Utah, 275, 44 Pac. Rep. 932. App. 392, and cases cited. See also, *Railway Co. v. Carpenter*,

to fence its track.¹⁰ The duty to construct proper fences is imposed by statute in some states.¹¹

Sec. 956. (§ 531.) Duty as to examination of vehicles and other apparatus.—It is laid down in some of the cases that the carrier is required to examine his vehicles and other apparatus for the conveyance of his passengers previous to the commencement of each journey, and that if he fail to do so and an injury happen to a passenger, caused by a defect in any of them, which might have been discovered by such an examination, he will be obnoxious to the charge of negligence and responsible for the injury.¹² Of this rule he was held to a punctilious observance, where it was proven that when the accident happened the coach was on its second journey after the last examination which had been made of it; and, although it had just before been repaired at the coachmaker's, the carrier was held liable. "For," as said by Best, J., "when ten or fourteen people are placed on the outside, as is the case with many of these stages, a master is guilty of gross negligence if no inspection of the coach takes place immediately previous to each journey."¹³

Sec. 957. (§ 532.) Same subject.—This rule, however, was established in the old stage-coach days, and was of course intended for the guidance of carriers by the modes of conveyance then in vogue. It does not, it is apprehended, apply to steamboats and railways, which are now the principal carriers. The modes of testing the safety of the former are prescribed by general statutory laws, which require their inspection at certain stated periods and in certain prescribed modes,¹⁴ while the latter would hardly fulfill the law by exami-

10. *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. Rep. 528; *Railroad Co. v. Thompson*, (Tex. Civ. App.) 77 S. W. Rep. 439.

11. *Railroad Co. v. Elder*, 149 Ill. 173, 36 N. E. Rep. 565, *affirming* 50 Ill. App. 276; *Railway Co. v. Hendricks*, 128 Ind. 462, 28 N. E. Rep. 58.

12. *Sharp v. Grey*, 9 Bing. 457; *Ware v. Gay*, 11 Pick. 106; *Ingalls v. Bills*, 9 Met. 1; *Hanley v. The Railroad*, 1 Edm. Sel. Cas. 359.

13. *Bremner v. Williams*, 1 C. & P. 414.

14. The failure to keep the floor constantly dry around the water

nations only previous to the commencement of each journey, but are required to be continually watchful of their vehicles, including all the means used by them in the transportation, and cautiously to observe all the accustomed and known tests for the discovery of their insufficiency as often as the circumstances may require. In this matter no invariable rule can be laid down by which they are to be governed; for what would be prudence and caution upon one journey and in one state of weather might not be so considered upon another journey, or over a different road, or at another season.

Railroad companies, it is said, have two means of informing themselves as to the condition of their cars. First, inspection made while the train is at rest by persons assigned to that service; and, secondly, the cursory and current observations of those members of the train crew whose duty it is to be on and in the cars while the train is in motion, and who are expected as they go about their business to have an eye to their surroundings. The observation that the conductor or brakeman may reasonably be relied on to make is, however, necessarily incidental to the performance of other duties and, on that account, is less exhaustive than a regular inspection.¹⁵ It cannot, therefore, be continuous,¹⁶ and on that ground a rail-

cooler in the steerage of a vessel will not render the vessel liable for injuries due to the slipping of a steward thereon and spilling hot gruel on a passenger. *The Anchoria*, 83 Fed. 847, 27 C. C. A. 650, 51 U. S. App. 608, *affirming* *Mulvana v. The Anchoria*, 77 Fed. 994.

The "utmost human care and foresight" is required of carriers of passengers in providing safe machinery and mechanical appliances, and only reasonable care is required in respect of matters in which the passenger may exercise judgment and discretion. If the owner of a steamer removes the tables in the dining saloon,

and leaves the sockets used to secure them projecting above the floor and exposed, a passenger who is cognizant of their presence, and through a lurch of the sea, falls over a socket, cannot hold the owner of the steamer liable for his injuries. *Bruswitz v. Navigation Co.*, 64 Hun, 262, 19 N. Y. Supp. 75.

As to ice on the decks of ferryboats, see *Rosen v. City of Boston*, 187 Mass. 245, 72 N. E. Rep. 992, 68 L. R. A. 153.

15. *Proud v. Railroad Co.*, 64 N. J. Law 702, 46 Atl. 710, 50 L. R. A. 468.

16. *Proud v. Railroad Co.*, *supra*; *Palmer v. Pennsylvania Co.*, 111

road company has been held not liable for the locking of the door of a water-closet on a female passenger through a mere accident, and her consequent confinement therein for a few minutes,¹⁷ and, in the absence of proof that sufficient time had elapsed to charge the servants with notice of its presence, and to give them a reasonable opportunity to remove it, the railroad company was held not liable for injuries caused by slipping on snow or ice,¹⁸ vomit¹⁹ or mud,²⁰ which had been deposited on the steps or platforms of the cars while en route. But the rule as to regular inspection of railroad vehicles while

N. Y. 488, 18 N. E. Rep. 859, 2 L. R. A. 252.

In this case the car in question had a well and safely constructed platform provided with all the conveniences and appliances ordinarily used to afford safety and comfort to its occupants, with proper and convenient steps and hand-rails. During a night trip, in a storm of sleet and snow, a thin covering of ice had formed upon the platform, upon which a passenger, who had several times passed over it and knew of its condition, slipped and was injured. "The presence of snow or ice upon exposed places on moving cars is an accident of the hour, and no ordinary diligence could, during the prevalence of a storm, wholly remove its effects from the places exposed to its action, so as to prevent accidents to heedless and inattentive travelers. A passenger on a railroad train has no right to assume that the effects of a continuous storm of snow, sleet, rain or hail will be immediately and effectually removed from the exposed platform of the car while making its passage between stations or the termini of its route, and it would be an obligation be-

yond a reasonable expectation of performance to require a railroad corporation to do so."

17. *Gulf, etc. R'y Co. v. Smith*, 10 Tex. Civ. App. 338, 30 S. W. Rep. 361.

18. *Palmer v. Railroad Co.*, 111 N. Y. 488, 18 N. E. Rep. 859, 2 L. R. A. 252.

No legal duty is imposed upon a railroad company to remove ice from the railing or platform of the front end of the express car, or to make such platform safe for passengers to get on or ride upon the same. *Railway Co. v. Allender*, 59 Ill. App. 620; *s. c.* 47 Ill. App. 484.

In *Railway Co. v. Aldridge*, 27 Ind. App. 498, 61 N. E. Rep. 741, the plaintiff knew of the presence of snow and ice on the rear platform, and that the conductor was stationed at the front end of the car to assist passengers in alighting, but he persisted in getting off at the rear end. He was held guilty of such contributory negligence as would bar a recovery.

19. *Proud v. Railroad Co.*, 64 N. J. L. 702, 46 Atl. Rep. 710, 50 L. R. A. 468.

20. *Vancleve v. Railroad Co.*, 107 Mo. App. 96, 80 S. W. Rep. 706.

at rest is much stricter than that relating to their inspection while in motion. Such inspection must then be made as is consistent with that degree of engineering skill and experience required in the careful and prudent operation of railroads; and for any injury resulting from the company's failure to so inspect its vehicles, it will be liable. Under circumstances of more than ordinary peril, as in case of violent storms or floods, the railroad company must inspect its vehicles with more than ordinary promptitude, particularly those parts which are the most apt to become defective from such causes. The greater the peril, the greater is the vigilance demanded.²¹ And this vigilance extends to the inspection of sleeping cars owned by another company which the railroad company invites its passengers to use.²²

5. *Duty as to servants employed.*

Sec. 958. (§ 533.) Responsibility for the character of servants employed.—It is equally important and imperative that the employees or servants of the carrier shall be competent, attentive and sufficiently skilled for the performance of the duties to which they may be assigned. As to the responsibility of coach proprietors in this respect, it was said by Best, J., that “the coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach

21. *Libby v. Railroad Co.*, 85 Me. 34, 26 Atl. Rep. 943, 20 L. R. A. 812; *Keating v. Railroad Co.*, 104 Mich. 418, 62 N. W. Rep. 575.

If snow and ice were on the steps of a car before the train started, and the steps were in such a condition that some one was likely to slip upon them, the jury

is warranted in finding that their condition ought to have been remedied at the earliest practicable moment. *Gilman v. Railroad Co.*, 168 Mass. 454, 47 N. E. Rep. 193.

22. *Robinson v. Railroad Co.*, 135 Mich. 254, 97 N. W. Rep. 689.

proprietors is not fulfilled, and they are answerable for any injury or damage that happens.''²³ And this definition of the diligence required of such carriers has been substantially repeated in a number of American cases.²⁴ And when the route or journey upon which he is employed is one more than ordinarily exposed to the danger of attacks by robbers and outlaws, the driver, besides being competent in other respects, must be cool, self-possessed, prudent, and of good judgment and forethought.²⁵

Sec. 959. (§ 534.) Same subject—Liable for their negligence, imprudence or incompetency.—For any carelessness, imprudence or incompetency of the driver, the proprietor will of course be liable to the same extent as for his own. It has accordingly been held that if, of two ways, the driver, with knowledge of the fact, select the one which is the more hazardous;²⁶ or if the accident be caused by racing or improper speed;²⁷ or if he fail to caution the passengers when passing over a part of the road more than ordinarily dangerous;²⁸ or if through his negligence the passenger is put in a position of danger, in the attempt to escape from which he is injured,²⁹ even though if he had remained quiet and made no effort to extricate himself from the supposed danger, he would have re-

23. *Crofts v. Waterhouse*, 3 Bing. 319. road by showing that the injured passenger directed or expressed a wish to travel over such road.

24. *McKinney v. Nell*, 1 McLean, 540; *Tuller v. Talbot*, 23 Ill. 357; *Budd v. Carriage Co.*, 25 Ore. 314, 35 Pac. Rep. 660, 27 L. R. A. 279.

Farish v. Reigle, 11 Gratt. 697; *Frink v. Coe*, 4 G. Greene (Iowa), 555; *Stokes v. Saltonstall*, 13 Pet. 181; *Benner Livery Stable Co. v. Busson*, 58 Ill. App. 17.

25. *Holladay v. Kennard*, 12 Wall. 254. 27. *Mayor v. Humphries*, 1 C. & P. 251.

26. *Mayhew v. Boyce*, 1 Starkie, 423. 28. *Maury v. Talmadge*, 2 McLean, 157; *Laing v. Colder*, 8 Penn. St. 479; *Dudley v. Smith*, 1 Camp. 167.

29. *Stokes v. Saltonstall*, 13 Pet. 181; *Ingalls v. Bills*, 9 Met. 1; *Jones v. Boyce*, 1 Stark. 493; *Caswell v. The Railroad*, 98 Mass. 194.

The carrier cannot escape liability for an injury caused by driving a team over an unsafe

ceived no injury;³⁰ or if the accident be attributable to the intoxication of the driver the carrier is responsible.³¹

Sec. 960. (§ 535.) Same subject—Companies and corporations liable.—As to companies and corporations, by which by far the greater part of the business of the carriage of passengers is now done, and which necessarily act through agents, the law will recognize no distinction when the question is one of negligence between such agents and their principals, except so far as the remedy is concerned; and in questions of liability for injuries occasioned by negligence or incompetency between such carriers and their passengers, the officers and agents of the former will be identified with their principals, and the question of negligence, unfitness or incompetency to which the injury is referred will be treated as one between the injured passenger and the officer or agent himself,³² and such companies will be regarded as constructively present in all acts performed by their agents and servants within the range of their ordinary employments.³³ And when such carriers

30. *Eldridge v. The Railroad*, 1 Sand. 89; *Railroad v. Aspell*, 23 Penn. St. 147; *Buel v. The Railroad*, 31 N. Y. 314; *Dimmitt v. Railroad Co.*, 40 Mo. App. 654, citing *Hutch. on Carr.*

In *Ephland v. Railway Co.*, 71 Mo. App. 597; s. c. 57 Mo. App. 147, a brakeman wantonly terrified passengers by calling out, "Jump for your lives!" and by rushing to the brakes. The plaintiff believed himself to be in imminent danger, jumped off the train and was injured. The railroad company was held liable, although there was a strong dissenting opinion on the ground that the brakeman was not acting within the scope of his authority.

31. *Frink v. Coe*, 4 Greene (Iowa), 555.

32. *Louisville, etc. R. R. v. Col-*

lins, 2 Duvall, 114; *Pittsburg, etc. R. R. v. Duby*, 38 Ind. 294; *Railway Co. v. Brown*, 113 Ga. 414, 38 S. E. Rep. 989.

The captain of a vessel is a general agent of the owner, but his authority does not extend beyond the transactions and concerns within the scope and business of his principal. The shipowner will not be liable in damages to a passenger therefore when the master gratuitously undertakes to deliver a telegram to a passenger. *Davies v. Steamboat Co.*, 94 Me. 379, 47 Atl. Rep. 896, 53 L. R. A. 239.

33. *Bass v. The Railway*, 36 Wis. 450; *Washburn v. The Railroad*, 3 Head, 638; *Taillon v. Mears*, 29 Mont. 161, 74 Pac. Rep. 421.

If an employe of the carrier negligently pushes or crowds a pas-

employ for the carriage of their passengers steam power, and undertake to convey them by railroads and steam vessels, in which mode of carriage the least omission of duty or want of necessary skill or promptness may be attended with the most disastrous results, they will be required to exercise even more circumspection, if possible, than carriers by other modes of conveyance, in the selection of their employees. As said by Grier, J., in the case of *The Philadelphia & Reading Railroad v. Derby*,³⁴ "a large proportion of the accidents on railroads are caused by the negligence of the servants or agents of the company. Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property. The intrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control, and render implicit obedience to orders, is itself an act of negligence, the '*causa causans*' of the mischief; while the proximate cause, or the '*ipsa negligentia*' which produces it, may truly be said, in most cases, to be the disobedience of orders by the servant so intrusted. If such disobedience could be set up by a railroad company as a defense when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed, and the danger to the life and limb of the traveler greatly enhanced. Any relaxation of the stringent policy and principles of the law affecting such cases would be highly detrimental to the public safety.'"³⁵

Sec. 961. (§ 536.) Same subject—Liability for knowingly retaining unfit servants—Ratification.—And if, with knowledge of his incompetency, unfitness, or intemperate habits, such carriers employ a servant, or retain him in the management of any portion of their business upon which the safety of

senger, who is about to alight, 185 Pa. St. 46, 39 Atl. Rep. 820.

from the car, and an injury fol- 34. 14 How. 468.

lows, the carrier is liable when 35. And see *Carpue v. The Rail-*

the employe is acting in the line way, 5 Ad. & El. (N. S.) 747.

of his duty. *Schimpf v. Harris*,

their passengers may depend, it will be gross misconduct on the part of the carrier, and if an accident occur therefrom, from which the passenger sustains an injury, he will not be confined, in his recovery against the carrier, to merely compensatory damages.³⁶ And it has been said that if such carriers employ a servant or agent of intemperate habits, and an accident occur which might have been avoided or prevented by any exertion of skill or diligence on his part, the law will presume that it was occasioned by his intemperance, and the burden will be thrown upon the company of showing that at the time of its occurrence he was sober.³⁷ And evidence of the intemperate habits of an employe, with knowledge on the part of a railroad company, may be shown, with a view to the enhancement of damages; for if a railroad company knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is brought home to it, or to a superintendent authorized to discharge him, and injury occurs by reason of such habits, the company will be amenable to the severest rule of damages.³⁸

6. *Duty, to accept passengers.*

Sec. 962. (§ 537.) Their duty to accept as passengers those who offer themselves for carriage.—It has never been directly decided by the courts of England whether, at common law, those who hold themselves out as carriers of passengers are obliged to receive and carry all persons who offer themselves, as common carriers are to accept and carry all the goods of-

36. *Cleghorn v. The Railroad*, 56 N. Y. 44; *Frink v. Coe*, 4 Greene, *supra*; *Caldwell v. S. B. Co.*, 47 N. Y. 282. *kings v. Railroad Co.*, 55 Mo. 201. *In Gulf, etc. R. Co. v. Kirkbride*, 79 Tex. 457, 15 S. W. Rep. 495, the court hold that an act of a

37. *Penn. R. R. v. Books*, 57 Penn. St. 339. servant for which the master was not at the time liable does not

38. *Cleghorn v. The Railroad*, 56 N. Y. 44; *Gasway v. Railroad Co.*, 58 Ga. 216; *New Orleans, etc. R. Co. v. Burke*, 53 Miss. 200; *Bass v. Railway Co.*, 42 Wis. 654; *Per-* become his act because he afterwards refuses to discharge the servant. Citing *Railway Co. v. McDonald*, 75 Tex. 46.

ferred to them for that purpose. The case of *Bretherton v. Wood*,³⁹ which is generally cited to sustain the position that they are so bound, is only inferentially a decision of the question. It was an action against ten proprietors of a coach for injuries to the plaintiff as a passenger through negligence, and verdict and judgment having been given against eight and for two of the ten, error was brought on the ground that the action was upon a contract, and that therefore the judgment could only be rendered against or for the whole number sued. But it was held in the exchequer chamber that the action was upon the case and not founded upon contract, and being "against a common carrier upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that by their negligence or default no injury or damage happen," it was held that the objection was not well taken. This case, however, as is evident, merely decides that the right of the passenger to be carried safely, after he has been received as such by the carrier, does not depend on his having made a contract for his carriage, but that the fact of being a passenger casts a duty upon the carrier by implication of law, and, independently of contract, to carry him safely, and enables the plaintiff to sue either in *assumpsit* for breach of the contract or in tort for the breach of duty, which, as a rule of law, is confirmed by many cases both in this country and in England.⁴⁰ The subject of the general obligation to receive and carry was subsequently, in another case, discussed at length by counsel before the court of common pleas, but the case went off on a question of pleading which made it unnecessary to decide the question.⁴¹ In the case of railways and canals,

39. 3 B. & B. 54.

40. *Austin v. The Railway, L. R.* 2 Q. B. 442; *Marshall v. The Railway*, 11 Com. B. 655; *Eaton v. The Railroad*, 11 Allen, 500; *McElroy v. The Railroad*, 4 Cush. 400; *New*

Orleans, etc. R. R. v. Hurst, 36 Miss. 660; *Union Pacific R. R. v. Nichols*, 8 Kan. 505; *Nolton v. The Railroad Corporation*, 15 N. Y. 444. 41. *Bennet v. The Peninsular S. B. Co.*, 6 Com. B. 775.

however, it is, in England, regulated by statute, and they are bound to carry all persons who may offer themselves.⁴²

Sec. 963. (§ 538.) Same subject.—But in this country it has been settled by a number of cases that those who hold themselves out generally as carriers of passengers, or engage publicly in that business,⁴³ are no less bound to receive and

42. *Denton v. The Railway Co.*, 5 El. & B. 860, being carried, an accident happened to the train, by its running upon an ox which had strayed upon the track, and the plaintiff was injured. "In the rendition of these services for the plaintiff," says Field, J., "the defendants were simply private carriers for hire. As such carriers, having only a construction train, they were not under the same obligations and responsibilities which attach to common carriers of passengers by railway. The latter undertake, for hire, to carry all persons indifferently who apply for passage; and the law, for the protection of travelers, subjects such carriers to a very strict responsibility. It imposes upon them the duty of providing for the safe conveyance of passengers, so far as that is practicable by the exercise of human care and foresight. . . . It is evident that the defendants in this case were not subject to any such stringent obligations and responsibilities as are here mentioned. They did not hold themselves out as capable of carrying passengers safely; they had no arrangements for passenger service, and they were not required to make provisions for the protection of the road, such as are usually adopted and exacted of railroad companies. They did not own the road, and had no interest

43. The term "common carrier" is used to designate only those who undertake, as a public business, to carry goods. Carriers of passengers, however public their business, are not, in the technical sense of the words, common carriers, though they are so as to the baggage of passengers.

But still there may be common or public carriers of passengers as well as private carriers of persons for hire. Between these a well recognized distinction exists, somewhat similar to that between the common and the private carrier of goods for hire. In *Shoemaker v. Kingsbury*, 12 Wall. 369, the defendants were contractors for building a division of a railroad, and were running a construction train to transport material for the road. This train was not adapted for passengers, and, according to the testimony, the defendants did not desire to carry passengers, although when persons got on to ride, the defendants did not put them off; and sometimes, though not always, fare was charged for the carriage. The plaintiff requested to be carried upon the train, and the defendants undertook to carry him as he requested, for which he paid them fare. While the plaintiff was thus

carry all such as may offer themselves to be carried, who pay or tender the proper compensation for whom the carrier has accommodations, and to whom there may be no legal objection, than are common carriers to accept and carry goods which may be tendered to them for that purpose, or innkeepers to re-

in it beyond its construction. It was no part of their duty to fence it in, or to cut away the bushes and weeds growing on its sides.

. . . The plaintiff knew its condition, and the relation of the defendants to it, when he applied for passage. . . . He therefore took upon himself the risks incident to the mode of conveyance used by the defendants when he entered their cars. All that he could exact from them, under these circumstances, was the exercise of such care and skill in the management and running of the trains as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances." In *The Nashville & Chattanooga Railroad v. Messino*, 1 Sneed, 220, the facts were the same, except that "freight and passengers were received and carried for pay, regularly and without refusal;" but there had been no solicitation of passengers, or public notice that they would be carried. The case having been submitted to a jury, with the instruction that a common carrier of passengers is one who undertakes, for hire, to carry all persons indifferently who may apply for passage, and that to constitute one such a common carrier it was necessary that he should hold himself out to the community as such, but that "a party having the conveniences for carrying persons

may, in some, or perhaps in many, cases carry passengers for hire, when done at the instance of the passengers and for their accommodation, without incurring the responsibilities of common carriers," this statement of the law was approved, and the distinction between private and common carriers of persons, as to the degree of responsibility incurred, was said to be that the former "would be held accountable under rules much less stringent." Nor will a railroad become a common carrier of passengers by its freight trains, by reason of occasionally carrying passengers upon them, as a matter of accommodation, although fare be charged for their carriage, any more than it will become a common carrier of goods by its passenger trains, from occasionally carrying them for accommodation. *Murch v. The Railroad*, 29 N. H. 9; *Elkins v. The Railroad*, 23 *id.* 275.

The real inquiry in such cases, as in the carriage of goods, is whether it was the business or custom of the party sought to be charged with liability to receive and carry passengers for hire. Otherwise, in the absence of any contract, and especially if it should appear that he had never undertaken the business generally and was induced to carry the injured person upon the particular occasion at his solicitation, even

ceive and entertain travelers.⁴⁴ And when a person has paid or tendered the proper compensation to the carrier, and the carrier has accommodations and there is no legal objection to receiving him as a passenger, the right to enter the car is not merely one of private contract, but is also one of public law, and the duty will rest upon the carrier to admit him as a passenger. If, after having secured his right to enter, he is refused admittance, he may make reasonable effort to exercise his right to enter, and if his conduct does not transgress the limit of reasonable effort, and is not *mala fide* for the purpose of provoking resistance or insult, any tort against his person by the agents of the carrier resulting from a refusal to admit him to the cars will be actionable, and the accompanying indignity will be a legitimate element of compensatory damages.⁴⁵

Sec. 964. (§ 538a.) Same subject—Right to be carried on freight trains, etc.—Most railroad companies are carriers both of passengers and goods, and while they may undertake to carry both upon the same train, they are not compelled to, but may lawfully divide the traffic, furnishing separate trains for each, and, having done so, may lawfully refuse to carry passengers upon their freight trains or freight upon their passen-

though for hire, the strictly legal relation of carrier and passenger, with all its rights and responsibilities, would not arise. Proof of such facts would raise the presumption that the party was not carried as a passenger, and if the attempt is made to overcome it by showing a contract, it must appear that the person with whom it was made was either the carrier himself or some one who had authority to act for him in the matter.

44. *Bennett v. Dutton*, 10 N. H. 481; *Jencks v. Coleman*, 2 Sum. 221; *Saltonstall v. Stockton*, Taney's Dec. 11; *Pearson v. Duane*, 4 Wall. 605; *Hannibal R. R. v.*

Swift, 12 *id.* 262; *Indianapolis, etc. R. R. v. Rinard*, 46 Ind. 293; *Lake Erie, etc. R'y Co. v. Acres*, 108 Ind. 548; *Tarbell v. The Railroad*, 34 Cal. 616; *Mershon v. Hobensack*, 2 Zab. 372; *Galena, etc. R. R. v. Yarwood*, 15 Ill. 468; *Barney v. Steamboat Co.*, 67 N. Y. 301; *Story v. Railroad Co.*, 133 N. C. 59, 45 S. E. Rep. 349.

Where a passenger entitled to be carried is wrongfully prevented by the gate-keeper from reaching and entering the train, he may recover. *Baltimore, etc. R. Co. v. Carr*, 71 Md. 135, 17 Atl. Rep. 1052.

45. *Runyan v. Railroad Co.*, 65 N. J. Law 228, 47 Atl. Rep. 422.

ger trains.¹ And where a railroad company has so divided its traffic, the presumption will be that a person who was riding on one of its freight trains was not legally a passenger, and the burden of proof will be upon him to show that under the special circumstances of the case he occupied the relation of passenger to the company.² But where a long continued and notorious disregard of a regulation of the railroad company prohibiting the carriage of passengers on freight trains is shown, the presumption will arise that a person who was traveling on one of the company's freight trains was a passenger.³

In the absence of any rule or established custom permitting passengers to ride on freight trains, the presumption will be that those in charge of such trains have no authority to authorize passengers to ride upon them;⁴ and certainly where an

1. The railroad company has the right to refuse to carry passengers upon its freight trains and may eject those seeking to ride upon them. *Hobbs v. Railway Co.*, 49 Ark. 357; *Arnold v. Railroad Co.*, 82 Ill. 273; *Murch v. Railroad Co.*, 29 N. H. 9; *Elkins v. Railroad Co.*, 23 N. H. 275; *Thomas v. Railway Co.*, 72 Mich. 355; *Railroad Co. v. Best*, 169 Ill. 301, 48 N. E. Rep. 684, reversing 68 Ill. App. 532; *Roberts v. Smith*, 5 Arizona 368, 52 Pac. Rep. 1120; *Railroad Co. v. Moss*, 13 Ky. Law Rep. 684; *Cross v. Railway Co.*, 56 Mo. App. 664; *Gardner v. Railroad Co.*, — Mo. App. —, 93 S. W. Rep. 917.

So it may run a "pay train" and exclude passengers therefrom. *Southwestern, etc. R. Co. v. Singleton*, 66 Ga. 252.

2. *Purple v. Railroad Co.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700; *Smith v. Railroad Co.*, 124 Ind. 395, 24 N. E. Rep. 753; *Eaton v. Railroad Co.*, 57 N. Y. 382.

Although the carrier may have divided its passenger and freight traffic, if it accepts a particular individual upon a freight train, such person will occupy the relation of passenger. *Gardner v. Railroad Co.*, — Mo. App. —, 93 S. W. Rep. 917.

There can be no presumption that a freight train is designed to carry passengers from the fact that it has a caboose attached to it, since a caboose is usually furnished for the employes' use. *Railroad Co. v. Headland*, 18 Colo. 477, 33 Pac. Rep. 185, 20 L. R. A. 822.

3. *Greenfield v. Railway Co.*, 133 Mich. 557, 95 N. W. Rep. 546; *Railway Co. v. Lynch*, (Tex. Civ. App.) 40 S. W. Rep. 631.

The person claiming protection under this rule, however, must not know of the company's regulation. *Railway Co. v. Huff*, (Tex. Civ. App.) 78 S. W. Rep. 249; *s. c.* — Tex. —, 81 S. W. Rep. 525.

4. *Dysart v. Railway Co.*, 122 Fed. 228, 58 C. C. A. 592. But

express rule exists denying to passengers the right to be carried on freight trains, the conductor on such a train cannot, by consenting that a person may ride upon it, impose upon the railroad company the duty of exercising toward him the care which it owes to a passenger.⁵ But a contrary view has been taken by some courts, and it has been held that where a person offers himself as a passenger upon a freight train without knowledge that the company refuses to receive passengers upon it, he will be justified in relying upon the authority of the conductor in charge of the train, and that if such conductor receives him as a passenger, he will be lawfully such although he pays no fare, and although the conductor, by so doing, violated his instructions.⁶ But such person will have no right to rely upon the authority of a brakeman or other inferior servant when a conductor is in charge of the train.⁷ And when the person so offering himself knows that the conductor has no authority to receive him as a passenger, and he colludes with the conductor to allow him to ride, he cannot claim the rights of a passenger.⁸ So the implied authority of the conductor

this presumption may be overcome by proof of an order from the superior officer from whom conductors customarily receive such orders directing him to carry the person on his freight train.

5. *Eaton v. Railroad Co.*, 57 N. Y. 382, 15 Am. Rep. 513; *Smith v. Railroad Co.*, 124 Ind. 394, 24 N. E. Rep. 753; *Stalcup v. Railway Co.*, 16 Ind. App. 584, 45 N. E. Rep. 802; *Railroad Co. v. Berry*, 53 Kan. 112, 36 Pac. Rep. 53, 42 Am. St. Rep. 278; *Powers v. Railroad Co.*, 153 Mass. 188, 26 N. E. Rep. 446; *Railway Co. v. Cox*, 66 Ohio St. 276, 64 N. E. Rep. 119, 90 Am. St. Rep. 583; *Railroad Co. v. Hailey*, 94 Tenn. 383, 29 S. W. Rep. 367, 27 L. R. A. 549; *Railway Co. v. Block*, 87 Tex. 160, 27 S. W. Rep. 118.

6. *Whitehead v. Railroad Co.*, 99 Mo. 263, 11 S. W. Rep. 751; *McGee v. Railroad Co.*, 92 Mo. 208, 4 S. W. Rep. 739; *Gradin v. Railway Co.*, 30 Minn. 217; *Dunn v. Railroad Co.*, 58 Me. 187, 4 Am. Rep. 267; *Hanson v. Transportation Co.*, 38 La. Ann. 111; *Burke v. Railway Co.*, 51 Mo. App. 491; *Railroad Co. v. Frazer*, 55 Kan. 582, 40 Pac. Rep. 923 (construction train).

7. *Candiff v. Railway Co.*, 42 La. Ann. 477; *Reary v. Railway Co.*, 40 La. Ann. 33; *Brevig v. Railway Co.*, 64 Minn. 168, 66 N. W. Rep. 403; *McNamara v. Railway Co.*, 61 Minn. 296, 63 N. W. Rep. 726.

8. *Gulf, etc. R'y Co. v. Campbell*, 76 Tex. 174; *Railroad Co. v. White*, (Tex. Civ. App.) 34 S. W.

can go no further, under ordinary circumstances, than to receive him as a passenger in that part of the train upon which passengers might properly be expected to be carried, and he cannot claim the rights of a passenger when he accepts carriage elsewhere, as upon the engine attached to the train.⁹

But where a railroad company receives and undertakes to carry passengers upon its freight trains, it thereby, so far as the public is concerned, gives to its conductors upon such trains an apparent authority to accept persons upon them as passengers; and if any such conductor has been given instructions not to carry passengers on his train, such instructions will be considered as secret limitations upon his apparent authority, and they will not be binding on third persons unless such persons have actual knowledge that they have been given. This is a familiar principle of the law of agency, and no reason is perceived why it is not applicable to railroad companies.¹⁰ So the principle is well settled that if a passenger, who has purchased a ticket, enters a freight train by the direction of a station agent of the railroad company, and without notice of a regulation that passengers are not carried on freight trains, he is not a trespasser and will, at least until advised of the regulation and given an opportunity to alight in safety, be considered as lawfully on the train. And if he is ejected while

Rep. 1042; Toledo, etc. R'y Co. v. Kan. 582, 40 Pac. Rep. 923 (construction train).
Brooks, 81 Ill. 245; Smith v. R.

& Banking Co., 113 Ga. 9, 38 S. E. 9. Files v. Railroad Co., 149
Rep. 330; Railroad Co. v. Hailey, Mass. 204; Woolsey v. Railroad
94 Tenn. 383, 29 S. W. Rep. 367, Co., 39 Neb. 798, 58 N. W. Rep.
27 L. R. A. 549; McVeety v. Rail- 444, 25 L. R. A. 79; Railroad Co.
road Co., 45 Minn. 268, 47 N. W. v. Michie, 83 Ill. 427; Nightingale
Rep. 809; Hoehn v. Railroad Co., v. Union Colliery Co., 9 British
52 Ill. App. 662; affirmed, 152 Ill. Columbia, R. 453, 2 Can. Ry. Cases,
223, 38 N. E. Rep. 549; Railroad 47. But see Hanson v. Transpor-
Co. v. Best, 169 Ill. 301, 48 N. E. tation Co., 38 La. Ann. 111.

Rep. 684, reversing 68 Ill. App. 10. Lucas v. Railway Co., 33
532; Greenfield v. Railway Co., 133 Wis. 41; Simmons v. Railroad Co.,
Mich. 557, 95 N. W. Rep. 546; 41 Ore. 151, 69 Pac. Rep. 440; re-
Purple v. Railway Co., 114 Fed. hearing denied, 69 Pac. Rep. 1022;
123, 57 L. R. A. 700, 51 C. C. A. Fitzgibbon v. Railway Co., 108
564; Railroad Co. v. Frazer, 55 Iowa, 614, 79 N. W. Rep. 477; s. c.

the train is in motion, or at a dangerous and improper place, the company will be liable if he is thereby injured.¹¹

If the company has made known that it will carry passengers upon its freight trains only upon the passenger's complying with certain requirements, one who seeks to recover for not being so carried must show either that he had complied with the requirements or had used reasonable efforts to comply and had been prevented by the fault or negligence of the carrier or its servants.¹²

It is a matter of common knowledge, also, that riding upon freight trains is unavoidably accompanied with more delay, discomfort and danger than upon trains devoted exclusively to passengers, and the passenger who accepts carriage upon a freight train must be deemed thereby to have assumed these necessary incidents.¹³

Sec. 965. Same subject—Right to be carried on special or emergency trains.—A railroad company is under no legal duty to receive and transport passengers on a special train, made up for some emergency, as for the purpose of going to and returning from a wreck on the company's line. And one who, with knowledge of the circumstances, contracts with the conductor to be carried as a passenger on such train to and from

119 Iowa, 261, 93 N. W. Rep. 276; Everett v. Railway Co., 9 Utah, 340, 34 Pac. Rep. 289; Boggess v. Railway Co., 37 W. Va. 297, 16 S. E. Rep. 525, 23 L. R. A. 777.

11. Railroad Co. v. Davenport, 177 Ill. 110, 52 N. E. Rep. 266, affirming 75 Ill. App. 579; Railway Co. v. Ditto, 158 Ind. 669, 64 N. E. Rep. 222.

12. Indianapolis, etc. R. Co. v. Kennedy, 77 Ind. 507; Connell v. Railroad Co., (Miss.) 7 S. Rep. 344; Burlington, etc. R. Co. v. Rose, 11 Neb. 177; Thomas v. Railway Co., 72 Mich. 355; McCook v. Northup, 65 Ark. 225, 45

S. W. Rep. 547; Railway Co. v. Jackson, 3 Tex. Ct. R. 479, 61 S. W. Rep. 440; Railway Co. v. Stell, 28 Tex. Civ. App. 280, 67 S. W. Rep. 537; Ellis v. Railway Co., 30 Tex. Civ. App. 172, 70 S. W. Rep. 114; Railroad Co. v. Berry, (Tex. Civ. App.) 84 S. W. Rep. 258; Reed v. Railway Co., 76 Minn. 163, 78 N. W. Rep. 974.

13. Rodgers v. Railroad Co., — Ark. —, 89 S. W. Rep. 468, 1 L. R. A. (N. S.) 1145, citing Hutchinson on Carr.; Harris v. Railway Co., 89 Mo. 233; Crine v. Railway Co., 84 Ga. 651.

the wreck, and who pays fare for his passage in going, has no right to an action *ex delicto* against the company for a breach of contract in failing to furnish him return transportation on the same train.¹⁴

Sec. 966. What persons the carrier may refuse to accept.—

As the common carrier holds himself out as the carrier of only such goods as are in a fit condition to be carried, and may, as has been seen, notwithstanding his public profession, refuse to accept such as are unfit to be carried on account of their kind, the unsuitable manner in which they are prepared for transportation, or the insecurity or damage which they may occasion to the goods of other shippers or to the carrier himself, so the carrier of passengers, however publicly he may hold himself out or be engaged as such carrier, may refuse to accept persons offering themselves as passengers who are unfit to be carried, either because such persons, from bad character, from being afflicted by contagious disease,¹⁵ from apprehended evil designs,¹⁶ either upon the carrier himself or his passengers, or from drunkenness or insanity, would be unfit associates for them or unsafe for the carrier; or if any person refuses to pay his fare, or to submit to the reasonable regulations of the carrier, or if his purpose in seeking a passage is to interfere with or injure the business of the proprietors of the conveyance, or to make an assault upon another passenger, or if there be no room for him, or even if the carrying of the person offering himself as a passenger would probably excite

14. *Railroad Co. v. DuBose*, 120 Ga. 339, 47 S. E. Rep. 917; *DuBose v. Railroad Co.*, 121 Ga. 308, 48 S. E. Rep. 913.

15. *Walsh v. Railroad Co.*, 42 Wis. 23.

If, after making a contract to carry a person afflicted with an infectious or contagious disease, the carrier becomes aware of such person's condition, the carrier may put an end to the contract and decline to admit or carry him as

a passenger. But where the action is for a breach of contract, the carrier, to escape liability, must have offered to return the purchase money. *Pullman Co. v. Krauss*, — Ala. —, 40 So. Rep. 398.

16. Gamblers and monte men may be excluded, or, if found plying their nefarious practices, may be ejected. *Thurston v. Railroad Co.*, 4 Dill. 321.

popular violence, and expose him to great personal danger at the destination to which he desired to be carried, the carrier may refuse to carry such person.¹⁷ So the carrier may exclude and deny transportation to any person who, on account of some physical or mental disability, will be likely, if accepted as a passenger, to become a burden upon his fellow passengers or to require extra attention from the carrier. But inasmuch as experience has shown that many persons, seemingly incapacitated by physical disability, are, in truth, perfectly competent to travel alone, the courts, in the interest of the traveling public, have modified the rigor and limited the otherwise universal application of the rule by providing that any person desiring transportation shall be entitled to passage upon payment of the fare, notwithstanding his seeming incapacity, if, as a matter of fact, he is competent to travel alone without requiring other care than that which the law requires the carrier to bestow upon all his passengers alike, and his condition is such that the agent of the carrier, acting as a person of ordinary prudence, may reasonably infer that he is able to care for himself; and if, in any manner, proof of the capacity of the passenger to travel alone be brought to the knowledge of the carrier's agent, the carrier will be liable in damages if such

17. This last proposition was asserted by the court in the case of *Pearson v. Duane*, 4 Wall. 605. The plaintiff had been expelled from the city of San Francisco by what was known as a vigilance committee, with orders not to return, and sought a passage back to that place by the vessel of which the defendant was the commander. Having learned the circumstances of his expulsion, the defendant refused, after the passage had been commenced, to carry him on, and transferred him to another vessel and sent him back to the place at which he had taken his passage on the defendant's vessel. The court,

while admitting the obligation of passenger carriers, as a general rule, to receive and carry all who offered, stated that there were, nevertheless, exceptions to this rule, instancing the drunkenness, bad character or insanity of the person as affording sufficient reasons for such refusal; and expressed the opinion that, under the circumstances of the case, the defendant could well have refused a passage to the libellant if, in his opinion, his return to San Francisco would have tended to promote further difficulty there and would have endangered the life of the passenger.

person is excluded from his vehicles.¹⁸ So if a person, who on account of some physical or mental disability is unable to care for himself, provides assistance for that purpose, the carrier cannot rightfully refuse to accept him as a passenger.

Sec. 967. (§ 540.) Same subject—Right to exclude the blind.—“Primarily the affliction of blindness unfits every person for safe travel by railway, if unaccompanied. No blind person without previous experience could possibly accommodate himself to the many exigencies incident to travel by railroad, or guard himself against peril in boarding and alighting from trains, changing from one train to another, or threading his way in safety across the railway tracks at crowded stations. Hence the rule which provides that every blind person is presumed to be, in the absence of proof of experience, unfit to travel alone, is not unreasonable. Nor . . . (is) . . . such a regulation a hardship upon the persons afflicted with blindness or other disabling physical infirmity. It is rather a safeguard thrown around them for their own protection. Therefore, when a blind person applies to purchase a ticket, being himself unknown to the agent, and that ticket is refused, the carrier is not liable by this act alone to be mulcted in damages; but, as before indicated, if the agent of the carrier knows of his personal knowledge of the competency to travel of the particular person, or if the fact of such ability is made known to him in any manner, and he still persists wantonly and arbitrarily in his refusal to sell the person desiring passage a ticket, the carrier may be made to respond in damages for his oppressive act. And it is the duty of the agent of the carrier to listen to the explanation of the person desiring to purchase

In the absence of a usage permitting passengers to carry small packages of merchandise with them into the cars, a carrier may refuse to admit a person to its cars who undertakes to carry with him such articles. *Runyan v. Railroad Co.*, 44 Atl. Rep. 985, 64 N. J. Law, 67, 48 L. R. A. 744; s. c. 65 N. J. Law 228, 47 Atl. Rep. 422.

18. *Zackery v. Railroad Co.*, 74 Miss. 520, 21 So. Rep. 246, 36 L. R. A. 546, 60 Am. St. Rep. 529; *id.* 75 Miss. 751, 23 So. Rep. 435, 41 L. R. A. 385, 65 Am. St. Rep.

a ticket, and judge of his competency in the light of the facts then made known to him, and the question of the reasonableness or unreasonableness of his refusal is one of fact to be submitted to the jury, should litigation arise; and if it should appear that such refusal was reasonable under the circumstances as they then existed to the knowledge of the agent, the carrier would not be liable to damages; but, as in every other case, if it should develop that his action was caused by wantonness or a desire to arbitrarily injure, humiliate, or oppress the proposed passenger by such action, the carrier would be responsible, and would be liable both to compensatory and punitive damages.”¹⁹

Sec. 968. Same subject—Right to exclude the insane.—The carrier cannot absolutely refuse transportation in all cases to insane persons, but he may always insist that they be properly attended, safely guarded, and securely restrained. And even when such precautions have been taken the carrier may refuse to receive an insane person who exhibits signs of violence which indicate that his presence and conduct would tend to the manifest annoyance of others. Where, however, it becomes essential to transport one who, though only violent and noisy, is not responsible for his actions and may endanger the safety or interfere with the comfort of other travelers, the carrier is entitled to seasonable notice in order that he may make proper arrangements for such purpose.²⁰

Sec. 969. Same subject—Right to exclude intoxicated persons.—The carrier has a right to refuse admittance to his ve-

617; *Railroad Co. v. Smith*, 85 Miss. 349, 37 So. Rep. 643, 70 L. R. A. 642.

19. *Railroad Co. v. Smith*, 85 Miss. 349, 37 So. Rep. 643, 70 L. R. A. 642; *Zackery v. Railroad Co.*, 74 Miss. 520, 21 So. Rep. 246, 36 L. R. A. 546, 60 Am. St. Rep. 529; *id.* 75 Miss. 746, 23 So. Rep. 435, 41 L. R. A. 385, 65 Am. St. Rep. 617.

The carrier has the right to refuse to accept a person who is blind as a passenger unless such person is provided with an attendant prior to his starting on the journey. *Illinois Central R. Co. v. Allen*, — Ky. —, 89 S. W. Rep. 150.

20. *Owens v. Railroad Co.*, 119 Ga. 230, 46 S. E. Rep. 87, 63 L. R. A. 946.

hicles of a person who is so intoxicated as to be dangerous or annoying, both on account of the danger of injury to him, and his liability to become a nuisance to other passengers;²¹ but if he has been accepted as a passenger, he is entitled to be carried with the same care as other passengers, and cannot be ejected so long as he demeans himself peacefully and properly.²²

Sec. 970. Same subject—Right to exclude persons who interfere with the interests or business of the carrier.—Carriers have the right, as a common incident to their right of property, to consult and provide for their own interests in the management of their vehicles. They are consequently not bound to accept as passengers those whose object is to interfere with their interests or patronage so as to make the business less lucrative to them.²³ And while a regulation adopted by the carrier giving to one person the exclusive right to solicit on its vehicles the transfer business of its passengers will be valid,²⁴ the right to be transported as a passenger cannot be denied to a person, who stands ready to pay his fare, merely because he does something which the carrier considers detrimental to its business at other times and places than on its vehicle.²⁵

21. *Story v. Railroad Co.*, 133 N. C. 59, 45 S. E. Rep. 349; *Freedom v. Railroad Co.*, 48 N. Y. Supp. 584, 24 App. Div. 306.

In an action for forcible ejection from defendant's car, a rule of defendant requiring conductors not to allow intoxicated persons to ride on the car is not admissible, where it is not claimed on the trial that plaintiff was intoxicated, but it appears that he was afflicted with St. Vitus dance which produced involuntary motions somewhat resembling those of an intoxicated person. *Regner v. Rail-*

road Co., 26 N. Y. Supp. 625, 74 Hun, 202.

22. *Milliman v. The Railroad*, 66 N. Y. 642; *Putnam v. The Railroad*, 55 *id.* 108.

23. *Jencks v. Coleman*, 2 Sumner, 221.

24. *Lewis v. Railway Co.*, (Tex. Civ. App.) 81 S. W. Rep. 111.

25. This has been held with reference to a "ticket scalper" who trafficked in the carrier's tickets at other times and places than on the train. *Ford v. Railroad Co.*, 110 La. 414, 34 So. Rep. 585.

Sec. 971. (§ 541a.) Duty and liability as to carrying prisoners.—As has been seen, a carrier is not liable as for a conversion, where in good faith he receives goods from a person in apparent lawful possession and control of them, and, having carried them to their destination, redelivers them to such person, although the latter was not the owner of the goods and had no authority to deliver them for carriage.²⁶ So it has been held that where one, assuming to be an officer, represents himself as such to the conductor of a railroad train, and offers to put upon the train as a passenger a person whom he claims to have lawfully arrested for crime, the conductor is not required to inquire into the cause of the arrest and the authority of the officer, but is justified in taking such prisoner in good faith upon the train, and neither he nor the company is guilty of any wrongful act in so doing.²⁷

7. Separation of passengers for sex, color, etc.

Sec. 972. (§ 542.) Passengers may be separated according to sex, character, etc.—Color discriminations.—But though no one who may offer himself to be carried can be refused by the carrier if he be a fit person and in a fit condition to be carried, yet if the conveyance employed by him is adapted to the carriage of passengers separated into different classes, according to the fare which may be charged, the character of the accommodations afforded, or of the persons to be carried, the carrier may so divide them; and any regulation he may make confining those of one class to the part of the conveyance provided for it, and interdicting intrusions by them into that provided for another, will not be regarded as unreasonable if made in good faith for the better accommodation and convenience of the passengers. By such regulations the carrier is enabled to graduate his prices for the carriage, so that those who can afford or prefer to pay for the more expensive accommodations avoid the annoyances and discomforts which would

26. *Ante*, 148.

27. *Jackson v. Railway Co.*, 87 Mo. 422.

necessarily be occasioned by a promiscuous intermingling of all sorts of passengers in the same conveyance, whilst those who cannot or do not choose to pay the higher fare are afforded an opportunity to procure transportation which would otherwise be, perhaps, beyond their means, or at an expense which they would be unwilling to incur. No legal right is thereby denied and no one can, therefore, complain. Provision is accordingly made for such a separation, almost universally, by steamboats and railway carriers, and the necessary regulations to enforce it are adopted, and such regulations have been held to be not only lawful but highly commendable, as being conducive both to the public convenience and to the interest of the carrier. On that account state statutes requiring railroad companies engaged in domestic carriage to furnish separate coaches for white and colored people, provided no discrimination is made in the quality, convenience or accommodations of the cars or coaches set apart for white and colored passengers, have been held to be valid.²⁸

28. *Chesapeake & O. R. Co. v. Louisville, etc. R'y Co. v. State*, 66 Commonwealth of Kentucky, 179 U. S. 388, 45 L. Ed. 244, *affirming* 21 Ky. L. R. 228, 51 S. W. Rep. 160; *Louisville N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. Ed. 784, 10 Sup. Ct. R. 348, *affirming* 66 Miss. 662, 6 So. Rep. 203, 5 L. R. A. 132; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. Ed. 256, 16 Sup. Ct. R. 1138, *affirming* *Ex parte Plessy*, 45 La. Ann. 80, 18 L. R. A. 639, 11 So. Rep. 948; *Anderson v. Railroad Co.*, 62 Fed. 46; *Ohio Valley R. Co. v. Lander*, 20 Ky. L. Rep. 913, 926, 47 S. W. Rep. 344, 882; *Railroad Co. v. Catron*, 102 Ky. 323, 43 S. W. Rep. 443; *Chesapeake, etc. R. Co. v. Wells*, 85 Tenn. 613; *Memphis, etc. R. Co. v. Benson*, 85 Tenn. 627; *Smith v. State*, 100 Tenn. 494, 46 S. W. Rep. 566, 41 L. R. A. 432; *Louisville, etc. R'y Co. v. State*, 66 Miss. 662; *Segal v. Railway Co.*, (Tex. Civ. App.) 80 S. W. Rep. 233; *Henderson v. Railway Co.*, (Tex. Civ. App.) 38 S. W. Rep. 1136; *Railway Co. v. Ball*, 25 Tex. Civ. App. 500, 61 S. W. Rep. 327. Such separation is held lawful either as to cars, state-rooms, berths or tables where the carrier, in good faith, endeavors to give equal accommodations to each. *Houck v. Railway Co.*, 38 Fed. Rep. 226; *McGuinn v. Forbes*, 37 Fed. Rep. 639; *The Sue*, 22 Fed. Rep. 843; *Murphy v. Railroad Co.*, 23 Fed. Rep. 637; *Logwood v. Railroad Co.*, 23 Fed. Rep. 318. But in *Coger v. The Packet Co.*, 37 Iowa, 145, it was held that the steamboat company had no power to make and enforce a regulation to exclude negroes from any

And regulations designed for the comfort and protection of female passengers by separating them from those of the ruder

of the rights or privileges which were allowed to white passengers, and the company was liable to damages in an action by a negro passenger for an assault and battery in removing her from a seat at the dinner table, which had been provided and intended for white passengers exclusively, and which she had occupied contrary to a regulation of the company, and had refused to leave when requested. It was said that by the constitution and laws of the state of Iowa there was no difference between the white and negro races, and that all rights and privileges which were allowed to the former must be conceded to the latter, and that carriers could make no distinction. It was also said that the recent amendments to the constitution of the United States, and the laws of its congress, prohibited any such distinction. This latter position, however, is one which cannot be maintained in the light of later decisions.

In *Day v. Owen*, 5 Mich. 520, it was held that a carrier by steamboat might lawfully make and enforce a regulation excluding such passengers from the cabin appropriated to white passengers; and in the case of *The West Chester, etc., R. R. v. Miles*, 55 Penn. St. 209, it was held that a regulation of a similar character, excluding them from certain carriages of a train, was not illegal and could be enforced. These decisions were based upon the argument that it was the duty of the

carrier to provide, as far as he reasonably could do so, for the comfort of his passengers, which would be seriously lessened if the negro and the white passenger, between whom there existed socially a repugnance, were forced into social contact. It was said by Agnew, J., in the latter case, that there was a natural incongruity between the two races, and that the carrier in making a separation of them was but conforming to a condition of things which had existed and been sanctioned both by law and custom from the foundation of the government. It was also conceded by the court in the case of *The Chicago, etc., R. R. v. Williams*, 55 Ill. 185. The rule in Pennsylvania was soon after changed by statute. See *Central R. Co. v. Green*, 86 Penn. St. 421.

Under an enactment of congress that "no person shall be excluded from the cars on account of color," the requirement of separate cars for whites and blacks cannot be sustained. *Railroad Co. v. Brown*, 17 Wall. 445.

See also, *Bass v. The Railroad*, 36 Wis. 450; *Chicago, etc., R. R. v. Williams*, 55 Ill. 185; *Pittsburgh, etc., R. R. v. Hinds*, 53 Penn. St. 512; *Miller v. Steamboat Co.*, 12 N. Y. Suppl. 301.

There seems to be a difference of opinion among the courts as to whether state statutes requiring separate coaches for colored and white interstate passengers are void as regulations of interstate commerce. That such a state stat-

sex are said to be not only reasonable, but to be demanded by considerations of humanity.²⁹

ute is void has been held in *State ex rel. Abbot v. Hicks*, 44 La. Ann. 770, 11 So. Rep. 74; *Carry v. Spencer*, 36 N. Y. Supp. 886; *Hart v. State*, — Md. —, 60 Atl. Rep. 457, and *Anderson v. Railroad Co.*, 62 Fed. 46. The converse proposition has been held by the Supreme Court of the United States to be the law in the case of *Hall v. De Cuir*, 95 U. S. 485, reversing *Decur v. Benson*, 27 La. Ann. 1. In that case a negro woman sued the owner of a steamboat for refusing her a state-room in the cabin and a seat at the table with the white passengers on the boat. Wyly, J., in an able dissenting opinion, argued that there was nothing in the constitution or in the statutory law of Louisiana or of the United States which prohibited the carrier from making such a discrimination between negro and white passengers, and that the universal and long-existing custom of steamboats to do so, which was proven in the cause, as well as other reasons resting upon the difference between the two classes of passengers which made social contact and intercourse between them on terms of equality impossible, fully justified the carrier in making the separation. But the majority of the court, upon reasoning similar to that of the Iowa supreme court, held that no such distinction could be lawfully made, and that the plaintiff was entitled to recover. A statute of the state, however, forbade carriers from making any discrimination as to color, and the state

court held the statute valid and not a regulation of interstate commerce. The supreme court of the United States reversed this decision. Clifford, J., wrote a separate opinion, in which he sustains the right of separation.

The supreme court of Tennessee, in *Smith v. State*, 100 Tenn. 494, 46 S. W. Rep. 566, 41 L. R. A. 432, denied that the effect of *Hall v. De Cuir*, *supra*, was to render state statutes requiring separate accommodations for the white and colored races invalid as an attempt to regulate interstate commerce. But see *Plessy v. Ferguson*, 163 U. S. 537, 41 L. Ed. 256, 16 Sup. Ct. R. 1138.

As to the liability of a railroad company under a state statute requiring separate accommodations, when a white man is placed or intrudes in the negroes' cars, or *vice versa*, see the following cases.

Wood v. Railroad Co., 19 Ky. L. R. 924, 101 Ky. 703, 42 S. W. Rep. 349; *Quinn v. Railroad Co.*, 98 Ky. 231, 32 S. W. Rep. 742; *Segal v. Railway Co.* (Tex. Civ. App.), 80 S. W. Rep. 233; *Henderson v. Railway Co.* (Tex. Civ. App.), 38 S. W. Rep. 1136; *Railway Co. v. Ball*, 25 Tex. Civ. App. 500, 61 S. W. Rep. 327.

The Kentucky statute exempts railroad companies from providing separate accommodations on freight trains. *Louisville & N. R. Co. v. Commonwealth*, 25 Ky. L. R. 1442, 78 S. W. Rep. 167.

29. A regulation that none but ladies or ladies accompanied by male relatives or friends shall be

Sec. 973. (§ 543.) Same subject—Contract of carriage made subject to such regulations.—Every contract for the carriage of the passenger is therefore to be understood as made with reference to such regulations when they exist; and it must be determined either by the express terms of the contract or from the circumstances under which the passage is taken in what manner it was agreed that the passenger should be carried; and if by his contract or conduct he has elected to be carried in a particular manner, he cannot complain that he has been refused privileges or accommodations which have been allowed to others who have preferred and contracted for another manner of treatment, though in the same conveyance.

8. *Ejection of passengers for misconduct.*

Sec. 974. (§ 544.) But when once accepted, a passenger cannot be ejected unless guilty of some misconduct.—It does not follow, however, that because the carrier might have refused to receive the passenger had he known the objections at the time of his taking his passage, he may eject him for the same reasons when the facts are brought to his knowledge, after he has been received and the transportation has been commenced. In the case of *Pearson v. Duane*,³⁰ the court, after admitting that the circumstances, had they been known to the commander of the vessel before the passage was commenced, would have justified him in refusing to receive the

admitted to a given car is reasonable and valid. *Peck v. Railroad Co.*, 70 N. Y. 587; *Memphis, etc., R. Co. v. Benson*, 85 Tenn. 630; *Chilton v. Railroad Co.*, 114 Mo. 88, 21 S. W. Rep. 457, 19 L. R. A. 269, citing *Hutch. on Carr.*

But where a passenger can find no seat elsewhere and enters the ladies' car without objection, he is lawfully there and cannot be ejected by force, at least until a seat is offered him elsewhere. *Bass*

v. Railway Co., *supra*; *Thorpe v. Railroad Co.*, 76 N. Y. 402. See also, *Craker v. The Railroad*, 36 Wis. 657; *State v. Overton*, 24 N. J. (Law), 435; *Nieto v. Clark*, 1 Cliff. 145; *West Chester R. R. v. Miles*, *supra*.

30. 4 Wall. 605.

See on ejection of drunken passengers, *Milliman v. The Railroad Co.*, 66 N. Y. 462; *Putnam v. The Railroad Co.*, 55 N. Y. 108.

libellant as a passenger, goes on to say: "But this refusal should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exceptions to the character of the passenger or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board. This was not done, and the defense that Duane was a 'stow-away,' and therefore subject to expulsion at any time, is a mere pretense, for the evidence is clear that he made no attempt to secrete himself until advised of his intended transfer to the Sonora. Although a railroad or steamboat company can properly refuse to transport a drunken or insane man, or one whose character is bad, they cannot expel him after having admitted him as a passenger and received his fare, unless he misbehaves during the journey. Duane conducted himself properly on the boat until his expulsion was determined, and when his fare was tendered to the purser he was entitled to the same rights as other passengers. The refusal to carry him was contrary to law, although the reason for it was a humane one. The apprehended danger mitigates the act, but affords no justification for it."

Sec. 975. (§ 545.) Same subject—Not to be ejected for supposed bad character if properly conducting himself.—So in the English case of *Coppin v. Braithwaite*,³¹ the plaintiff had taken passage to his destination in the vessel of which the defendant was the commander. It being brought to the knowledge of the latter before the destination was reached, that the plaintiff was a pickpocket and a man of bad character, he, without any act of misbehavior on the part of the plaintiff, put him ashore at an intermediate place, for which the plaintiff brought an action against the owners of the ship for a breach of the contract to carry him to his destination, and it was held that, after the plaintiff had been received as a passenger on board the ship and the voyage commenced, the expulsion was illegal until the plaintiff had been guilty of some act of misbehavior to justify it, and that the circumstances

31. 8 Jurist, 875.

of insult and abuse under which he had been disembarked might be considered in estimating the damages to which he was entitled. The same rule was also applied in an elaborately considered case, in which the conductor of a train had forcibly ejected from the ladies' car of the train a woman, who was conducting herself with propriety, upon the ground that she was of generally bad character.³²

Sec. 976. (§545a.) Same subject—When one passenger may be ejected for misconduct of another.—Cases may easily be conceived in which the ejection of one person, having in his charge another not fit to be carried, would be justifiable, though he himself was unobjectionable, as in the case of the keeper of a madman, an officer in charge of a dangerous prisoner, likely to do present injury, and the like. But where no such element of control or responsibility existed the ejection of the innocent passenger could not be justified. Thus, a father traveling with his adult son cannot lawfully be ejected for his son's misconduct, for which the father is not at fault and in which he does not participate.³³

Sec. 977. (§ 546.) When the passenger may be ejected for improper conduct.—But the right of the carrier to expel the passenger, or to restrict his privileges in the conveyance when his conduct is such as to seriously interfere with the comfort of other passengers, or to endanger their safety, or when his purpose in becoming a passenger is to interfere or come in competition with the business of the carrier, is undoubted. In an admiralty case, in which it appeared that the libellant persisted in carrying on business as an express agent upon a boat against the orders of its officers, and, being ejected therefrom, filed his libel against the boat for indemnity for the wrong, it was held that the removal was justified. "A public conveyance of this character," said Hunt, J., "is not intended as a place for the transaction of the business of the passengers. The suitable carriage of persons or property is the only duty

32. *Brown v. Railroad Co.*, 7 Fed. Rep. 51.

33. *Louisville, etc., R. Co. v. Maybin*, 66 Miss. 83.

of the common carrier. A steamboat or railroad company is not bound to furnish traveling conveniences for those who wish to engage, on their vehicles, in the business of selling books, papers or articles of food, or in the business of receiving and distributing parcels or baggage, nor to permit the transaction of this business, when it interferes with their own interests. If a profit may arise from such business, the benefit of it belongs to the company, and they are entitled to the exclusive use of their vehicles for such purposes. This seems to be clear, both upon principle and authority.’³⁴

In expelling the passenger, however, the servants of the carrier act at their peril; and if such passenger is wrongfully expelled from the carrier’s vehicle, the fact that the servants acted under a misapprehension in supposing that he had been guilty of some misconduct will afford the carrier no excuse.³⁵

Sec. 978. Same subject—Ejection of drunken passengers.—

“The right of a conductor of a passenger train to eject one who refuses to pay his fare, or is drunk and disorderly, is unquestioned, but not absolute. It is subject to limitations. In exercising it, due care must be had to the condition of the person to be ejected, and the situation in which he will be placed when ejected. One helpless from any cause, and incapable of taking care of himself, must not be treated as one in the full possession of his faculties. In every case, care must be taken to expose the person ejected to no unusual or unnecessary hazard. At the same time, the conductor is responsible for his train, and it is not only his right, but may be his duty, to eject a trespasser or a drunken and disorderly passenger. Obviously, in doing this, he must to a large extent act upon appearances and in the light of probabilities. All the law requires is that he shall use reasonable care and caution.’³⁶ But the

34. The *D. R. Martin*, 11 Blatch. The Steamboat Co., 67 N. Y. 301.
 233; *Jencks v. Coleman*, 2 Sumn. **35.** *Lowe v. Railway Co.*, (1893)
 221; *Burgess v. Clements*, 4 62 L. J. Q. B. 524; *Seaboard, etc.,*
Maule & S. 306; *Fell v. Knight*, 8 *Ry. Co. v. O’Quin*, — Ga. —,
Meeson & W. 269; *Commonwealth* 52 S. E. Rep. 427.
v. Power, 7 Met. 596; *Barney v.* **36.** *Korn v. Railway Co.*, 125

conductor is not bound to wait until some act of violence, profaneness or other misconduct is actually committed before exercising his authority to expel the offender. It is sufficient if the offender, by means of intoxication or otherwise, is in such a condition as to make it reasonably certain that, by act or speech, he will become offensive or annoying to other passengers, although he has not committed any act of offense or annoyance.³⁷ On the other hand, the mere breach of good

Fed. 897, 62 C. C. A. 417, 63 L. R. A. 872.

In *Vinton v. The Railroad*, 11 Allen 304, the plaintiff sued the company for damages for his expulsion by the conductor from one of the company's street railway cars; but it being proven that there were other passengers on the car, some of whom were females, and that the plaintiff was, at the time, intoxicated, and was using loud, boisterous, profane and indecent language towards the conductor, and had attempted to strike him, it was held that the conductor not only had the power, but, being bound to take all proper measures to insure the safety and provide for the comfort of the passengers, and for that purpose to repress and prohibit all disorderly conduct in the company's vehicles, it was his duty to expel and exclude therefrom any person whose conduct or condition was such as to render acts of impropriety, rudeness, indecency or disturbance either inevitable or probable, and that he was not bound to wait until some overt act of violence, profaneness or other misconduct had been committed, to the inconvenience or annoyance of the other passengers, before exercising his authority. And in a

subsequent case in the same court, the law as thus laid down was followed, and the plaintiff was denied the right to recover for injuries received in the act of being ejected for intoxication, which rendered him offensive to other passengers, it appearing that the injuries were caused by his own struggles in resisting the expulsion. *Murphy v. The Railway Co.*, 118 Mass. 228.

Though having a proper ticket, a passenger who is drunk and disorderly may be ejected (*Sullivan v. Railroad Co.*, 148 Mass. 119); or who is drunk and advises other passengers to refuse to pay fare (*Baltimore R. Co. v. McDonald*, 68 Ind. 316); or who is guilty of using obscene and vulgar language (*Peavy v. Railroad Co.*, 81 Ga. 485). See also, upon this point, *Chicago Ry. Co. v. Pelletier*, 134 Ill. 120, 24 N. E. Rep. 770; *Railway Co. v. Saulsberry*, 112 Ky. 915, 66 S. W. Rep. 1051, 56 L. R. A. 580; *O'Laughlin v. Railroad Co.*, 164 Mass. 139, 41 N. E. Rep. 121; *Railroad Co. v. Barger*, 80 Md. 23, 30 Atl. Rep. 560, 26 L. R. A. 220, 45 Am. St. Rep. 319; *Cutler v. Railroad Co.*, 69 N. H. 641, 46 Atl. Rep. 1051.

37. *Edgerly v. Railroad Co.*, 67 N. H. 312, 36 Atl. Rep. 558.

manners in being drunk does not indicate that the passenger is a dangerous person and will not, in every case, authorize his expulsion, for it does not follow that, because a man is intoxicated, he is necessarily so unsafe or so offensive to other passengers that his expulsion from the conveyance will be justifiable, or will be required by the carrier's duty to his other passengers.³⁸

Sec. 979. Same subject—Breach of table manners.—So in *Prendergast v. Compton*,³⁹ the plaintiff sued the captain of the vessel for excluding him, while being carried as a passenger, from what was known as the “cuddy” of the ship, to which the defense was, that the conduct of the plaintiff was vulgar, offensive, indecorous and unbecoming. “There is some evidence,” said Tindal, C. J., “that he was in the habit of reaching across other passengers, and of taking potatoes and broiled bones with his fingers. It would be difficult to say, if it rested here, in what degree want of polish would, in point of law, warrant a captain in excluding a passenger from the cuddy. Conduct unbecoming a gentleman, in the strict sense of the word, might justify him; but in this case there is no imputation of the want of gentlemanly principle.”

9. *Duty of carrier to protect passenger.*

Sec. 980. (§ 548.) Duty of the carrier to protect the passenger.—The right, therefore, to expel the passenger after he has been taken is one to be exercised with great caution, and the propriety of its exercise, under the circumstances, is to be determined with sound judgment. It is true the vehicle belongs to the carrier, but when he employs it in a public business, every person to whom there is no legal objection, so long as there is room, has a right to enter and remain in it until he shall have been carried according to the public profession and undertaking of the carrier. But that right may be forfeited

³⁸. *Putnam v. The Railroad*, 55 ³⁹. 8 C. & P. 454.
N. Y. 108.

by his conduct, and in deciding whether it is so forfeited the carrier is not to consult alone his own rights or safety. His passengers have the right to demand of him that a fellow-passenger whose indecent and ungentlemanly conduct renders him an object of serious annoyance to them, or whose condition or manner gives reasonable ground for apprehending personal injury from his recklessness or violence, shall be removed or be so guarded or confined that they may be free from the annoyance or the danger.⁴⁰ And even without any such demand or suggestion from his passengers, it is a duty he owes to them, when the circumstances known to him are such as to create a reasonable apprehension of disorderly conduct or of a breach of the peace upon his conveyance, which may alarm or endanger his passengers, to be vigilant and prompt to suppress it when it occurs. And if, aware of the disturbance, he fail to use all the means in his power to suppress it, he will be liable for any damages which may ensue from it to an innocent passenger. The passenger, from the time he enters his vehicle, has the right to claim the protection of the carrier from the insults and violence of others, whether entering it as passengers or not, and the law exacts from him the prompt employment of all the means at his command to

40. *Railway Co. v. Blain*, 34 S. C. R. 74, 3 Canadian Ry. Cases 143, *affirming* *Blain v. Railway Co.*, 5 Ont. L. R. 334, 2 Canadian Ry. Cases 85 and *id.*, 2 Canadian Ry. Cases 69; *Railway Co. v. Boyle*, 115 Ga. 836, 42 S. E. Rep. 242, 59 L. R. A. 104; *Railroad Co. v. Arnold*, 26 Ind. App. 190, 59 N. E. Rep. 394; *Spangler v. Railway Co.*, 68 Kan. 46, 74 Pac. Rep. 607, 63 L. R. A. 634, 104 Am. St. Rep. 391; *Railroad Co. v. Finn*, 16 Ky. L. R. 57, citing *Hutch. on Carr.*; *Kinney v. Railroad Co.*, 99 Ky. 59, 34 S. W. Rep. 1066; *Railroad Co. v. Barger*, 80 Md. 23, 30 Atl. Rep. 560, 26 L. R. A. 220; *Mullan v. Railroad Co.*, 46 Minn. 474, 49 N. W. Rep. 249; *Fewings v. Mendenhall*, 88 Minn. 336, 93 N. W. Rep. 127, 97 Am. St. Rep. 519, 60 L. R. A. 601; *Partridge v. Woodland Steamboat Co.*, 49 Atl. Rep. 726, 66 N. J. Law 290; *Koch v. Railroad Co.*, 78 N. Y. Supp. 99, 75 App. Div. 282; *Duggan v. Railroad Co.*, 159 Pa. St. 248, 28 Atl. Rep. 186, 39 Am. St. Rep. 672; *Railway Co. v. Wood* (Tex. Civ. App.), 77 S. W. Rep. 964, citing *Hutch. on Carr.*

In *King v. Railway Co.*, 22 Fed. 413, the company was held liable for the death of a passenger who was killed by another passenger

protect the passenger against such outrages, either by quelling the disturbance or by the expulsion of those engaged in it, if necessary. In such an emergency, the duty of the carrier is said to be the same as that which he is under in other respects, to do all that can be done to insure the safety of the passenger.⁴¹ This duty of the carrier, however, is relative

suffering from delirium tremens and whom the conductor had negligently failed to restrain.

41. *Koch v. Railroad Co.*, 78 N. Y. Supp. 99, 75 App. Div. 282, the railroad company was held liable where the conductor merely told other passengers who were abusing plaintiff to "stop that fooling," and then went away, allowing the other passengers thereafter to throw the plaintiff on the floor and walk over him out of the car to the station.

In *Railroad Co. v. Darting*, 6 Ind. App. 375, 33 N. E. Rep. 636, several passengers assaulted plaintiff without cause. The conductor, although he had good reason to apprehend trouble, made no serious effort to prevent the attack, and when it finally occurred in the front part of the car, promptly sought the rear part of the car to "stop the train." The company was held liable.

See also, *Railroad Co. v. Jefferson*, 89 Ga. 554, 16 S. E. Rep. 69, 32 Am. St. Rep. 87, 17 L. R. A. 571; *Railroad Co. v. McEwan*, 21 Ky. L. R. 487, 51 S. W. Rep. 619; *Railway Co. v. Taylor*, 27 Ky. L. R. 351, 85 S. W. Rep. 168; *Railroad Co. v. Barger*, 80 Md. 30, 30 Atl. Rep. 561, 26 L. R. A. 220; *Lucy v. Railway Co.*, 64 Minn. 7, 31 L. R. A. 551, 65 N. W. Rep. 944; *United Railways, etc., Co. v. State*, 93 Md. 619, 49 Atl. Rep. 923,

86 Am. St. Rep. 453; *Railroad Co. v. Minor*, 69 Miss. 710, 10 So. Rep. 101, 16 L. R. A. 627; *West Memphis Packet Co. v. White*, 41 S. W. Rep. 583, 99 Tenn. 256, 38 L. R. A. 427; *Railway v. Flake*, 114 Tenn. 671, 88 S. W. Rep. 326; *Railroad Co. v. Henderson* (Tex. Civ. App.), 82 S. W. Rep. 1065; *Railway Co. v. Sherbert* (Tex. Civ. App.), 42 S. W. Rep. 639.

In the trial of an action for damages by a passenger for being compelled to ride in a car occupied by disorderly passengers, evidence that the conductor in charge of the train had, prior to the time that plaintiff became a passenger, made efforts to suppress the disorder is irrelevant when the question to be determined is whether such conductor was diligent in the suppression of disorder which arose after the plaintiff became a passenger. *Railway Co. v. O'Bryan*, 112 Ga. 127, 37 S. E. Rep. 161.

In *Railway Co. v. Greenthal*, 77 Fed. 150, 23 C. C. A. 100; *s. c.* *Meyer's Adm'x v. Railway Co.*, 54 Fed. 116, 4 C. C. A. 221, 10 U. S. App. 677, the railroad company was held liable for the death of a passenger caused by an insane fellow passenger.

In *Pounder v. Railway Co.*, (1892) 1 Q. B. 385, 61 L. J. Q. B. 136, the court held that there is no duty on the part of a carrier

and contingent and not absolute and unconditional. The negligence for which the carrier is held liable is not the wrong of the fellow-passenger or the stranger, but is the negligent omission of the carrier's servants to prevent the wrong from being committed. In order that such omission may constitute negligence, there is involved the essential element that the carrier or his servants had knowledge, or with proper care could have had knowledge, that the wrong was imminent, and that he had such knowledge or the opportunity to acquire it sufficiently long in advance of the infliction of the wrong upon the passenger to have prevented it with the force at his command.⁴²

Sec. 981. (§ 549.) Same subject—Carrier bound to protect against assaults which might reasonably be expected.—While

to take especial care of a passenger on account of any unknown peculiarity attaching to him. But the court's decision in this case is, at best, of doubtful validity. See *Blain v. Railway Co.*, 5 Ont. L. R. 334, 2 Can. Ry. Cases 85.

42. *United Railways, etc., Co. v. State*, 93 Md. 619, 49 Atl. Rep. 923, 86 Am. St. Rep. 453; *Mullan v. Railroad Co.*, 46 Minn. 474, 49 N. W. Rep. 249; *Railroad Co. v. Minor*, 69 Miss. 710, 11 So. Rep. 101, 16 L. R. A. 627; *Partridge v. Woodland Steamboat Co.*, 66 N. J. Law 290, 49 Atl. Rep. 726.

If a passenger is violently assaulted or ejected from the train by a fellow passenger while the conductor is absent or attending to his duties in another part of the train, not knowing of the assault or that it was threatened, the carrier cannot be held liable therefor, and a complaint which fails to allege that the conductor or brakeman in charge of the train was present at the time of

the assault or that they had reasonable grounds to apprehend that plaintiff was in danger, or that, if they had known of the assault, they could, in the exercise of reasonable care, have prevented it, is fatally defective on demurrer. *Railroad Co. v. Arnold*, 26 Ind. App. 190, 59 N. E. Rep. 394.

In *Connell's Ex'rs (Ball, et al.) v. Railroad Co.*, 93 Va. 44, 24 S. E. Rep. 467, 32 L. R. A. 792, 57 Am. St. Rep. 786, plaintiff's testator, while a passenger on a sleeping car, was shot by a robber who had intruded into the car, the injury later resulting in his death. It did not appear that the agents of the carrier had notice, or that there were any circumstances in the robber's entry upon the train which would have excited the apprehension of even the most careful and cautious. In an action against the railroad company it was held that the carrier would be liable in such a case only where its agents or employes knew, or, in

the carrier is not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, he is bound to provide ready help sufficient to protect the passenger against assaults from every quarter which might reasonably be expected to occur under the circumstances of the case and the condition of the parties.¹ In a case² in which a number of unruly persons forced themselves upon the car in which the plaintiff was a passenger, and in the course of a

the light of the surrounding circumstances, ought to have known that danger was threatened or was to be apprehended and then failed to use their authority and power to protect the passenger from the impending peril, and, it nowhere appearing that the servants knew or could, in the exercise of the utmost caution have anticipated what happened, that the carrier should not be held to answer.

Where a train stops at a regular meal station, it is not negligence for the crew to leave the train for the purpose of eating. If a passenger who remains on the train is assaulted by another passenger and an intruder, the carrier cannot be held liable. *Thweatt v. Railway Co.*, 31 Tex. Civ. App. 227, 71 S. W. Rep. 976.

The law as thus stated is expressly approved in a number of other cases, in some of which, however, the ground upon which the liability of the carrier was vested did not call for a direct application of the rule. *Bass v. The Railroad*, 36 Wis. 450; *Craiker v. The Railroad*, *id.* 657; *Godard v. The Railway*, 57 Me. 202; *Ramsden v. The Railroad*, 104 Mass. 117; *Chicago, etc., R. R. v. Griffin*, 68 Ill. 499; *Chicago, etc., R. R. v. Williams*, 55 *id.* 185; *Dan-*

iel v. Railroad, 117 N. C. 592, 23 S. E. Rep. 327; *Railroad v. McEwan*, 17 Ky. L. R. 406, 31 S. W. Rep. 465.

1. *Britton v. Railroad Co.*, 88 N. C. 536, citing *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200; *Pittsburgh, etc., R. Co. v. Hinds*, 53 Penn. St. 512; *Pittsburgh, etc., R. Co. v. Pillow*, 76 Penn. St. 510; *Flint v. Transportation Co.*, 34 Conn. 554.

In the *Britton* case the company was held liable to a colored passenger whom the conductor had failed, when called upon, to protect from the insults and assaults of white passengers. See also, *Batton v. Railroad Co.*, 77 Ala. 591; *Flannery v. Railroad Co.*, 4 Mackey, 111. In a remarkable case in Missouri the company was held liable where the conductor had permitted and to some degree aided a number of passengers to so intimidate and terrorize an ignorant and timid fellow-passenger by threats to rob him, tie him and throw him off the train, that in order to avert this fate he voluntarily leaped from the train while at full speed and received serious injuries. *Spohn v. Railway Co.*, 87 Mo. 77; *affirmed*, 101 Mo. 417.

2. *Pittsburgh, etc., R. R. v. Hinds*, 53 Penn. St. 512.

fight between some of them, one of them was thrown upon the plaintiff with such violence that her arm was very much injured, it was said that the negligence of the company, or of its officers in charge of the train, was the gist of the action; and that while it was not the duty of railroad companies to furnish their trains with a police force, they were bound to furnish men enough for the ordinary demands of transportation; and that if the conductor did not do all he could with the force he had upon the train, to stop the fighting, it was negligence. In such cases, it was said, he should stop the train, if necessary, and call to his assistance all its servants and as many of the passengers as are willing to lend a helping hand, and that until he has done this and put forth all the means at his disposal, he has no right to abandon the conflict. To keep his train in motion and busy himself in collecting fares whilst a fight was going on was, it was said, to fall short of his duty. He should not have been content with ordering the thing to be done. He should himself have led the way. "He should have stopped the train and hewed a passage through the intrusive mass until he had expelled the rioters, or have demonstrated by an earnest experiment that the undertaking was impossible."

Sec. 982. Same subject—Carrier's duty to protect female passengers.—The contract of carriage as to female passengers embraces an implied stipulation that the carrier will protect them against general obscenity, immodest conduct or wanton approach. In several cases the carrier has been held liable for failure to perform that duty.³ But this rule is also subject to the usual exception that the carrier is not liable for assaults on female passengers made under such unusual circumstances that the carrier could not possibly have foreseen them.⁴

3. *Railroad Co. v. Grundy*, 12 Ky. L. R. 293; *Railroad Co. v. Sherbert* (Tex. Civ. App.), 42 S. W. Rep. 639.
4. *Segal v. Railway Co.* (Tex. Civ. App.), 80 S. W. Rep. 233.
Finn, 16 Ky. L. R. 57; *Lucy v. Railway Co.*, 64 Minn. 7, 65 N. W. Rep. 944, 31 L. R. A. 551; *Railway*

Sec. 983. Same subject—Carrier not liable for accidents arising from rudeness or incivility of fellow-passengers.—The carrier of passengers is subject to no duty to guard against acts of mere rudeness or incivility, and is not negligent if it fails to do so. Rudeness cannot be said to amount to a breach of any positive law. The ordinary cars are, and must be, open to the masses among whom different degrees of intelligence and culture will be found. There is, therefore, a certain amount of rudeness, of haste, of selfish disregard for the feelings of others to be expected wherever men and women gather together; and the railway passenger car is no exception. But ordinarily unless such conduct amounts to a breach of the peace, the carrier is not bound to prevent it, nor is it liable in damages where such conduct has caused injury to a passenger.⁵

Sec. 984. Same subject—Duty to restrain or eject drunken passengers.—We have already had occasion to notice that, under certain circumstances, the carrier may have a right to eject drunken passengers, but under some circumstances he may not only have the right but it may be his duty towards other passengers to take such measures as are necessary to protect them from insults or injury at the hands of drunken men. If a drunken and disorderly man is on the carrier's vehicle, it will not do to say, after a passenger has been subjected to insult or injury, that the carrier's servants did not know or could not have foreseen that the particular individual who was insulted or injured was in danger of such insult or injury, if

5. *Madden v. Railroad Co.*, 90 N. Y. Supp. 261, 98 App. Div. 406 (passenger's arm jammed through the window of a car door by the pell-mell rush of other passengers); *Fritz v. Railway Co.*, 132 N. C. 829, 44 S. E. Rep. 613 (female passenger while alighting injured by male passenger attempting to push past her with a valise); *Ellinger v. Railroad Co.*, 153 Pa. St. Rep. 213, 25 Atl. Rep. 1132, 34 Am. St. Rep. 697 (female passenger's leg broken in alighting due to being jostled by male passenger); *Graeff v. Railroad Co.*, 161 Pa. St. 230, 28 Atl. Rep. 1107, 23 L. R. A. 606, 41 Am. St. Rep. 885 (female passenger injured by male passenger rudely pushing door open and striking her in face).

they were apprised, or with proper care could have known of circumstances which indicated that someone would be injured unless the disorderly passenger or stranger were ejected or controlled.⁶ Thus in one case where the facts were that in a fight upon a car between some drunken men, the conductor did not exert himself to suppress it as he should have done, and the plaintiff, a passenger who was not concerned in it, lost an eye, a verdict against the company was sustained; and it was said by the appellate court, "we cannot perceive the force of the argument of the counsel for the plaintiff in error, wherein he endeavors to raise a distinction between accidents arising from negligence in the equipment or management of the train and those arising from the misconduct of passengers upon it. If the employees of the road had no control or power over passengers, this argument would be sound. But they have

6. In *United Railways, etc., Co. v. State*, 93 Md. 619, 49 Atl. 923, 86 Am. St. Rep. 453, the plaintiff's intestate was riding as a passenger on the defendant's cars, and while so riding was assaulted by a drunken and disorderly person. Without any provocation the drunken person struck plaintiff's intestate a blow which later resulted in his death. It appeared that before the blow was struck, the drunken passenger had assaulted another passenger in the same car, and he had been ejected by the servants of the company for such act. He, however, got on the car again when it started, and, the servants of the company making no attempt to put him off, so remained. In a suit for wrongfully causing the death of plaintiff's intestate, the company was held guilty of negligence. So in *Railroad Co. v. McEwan*, 21 Ky. L. R. 487, 51 S. W. Rep. 619, where drunken negroes were on

a crowded train, and after a fight had occurred and a race collision seemed imminent, the conductor merely put them out of the car and upon the platform, where they were free to renew the conflict when opportunity offered, and a passenger consequently was shot by one of them, the company was held liable.

For similar cases and results see *Lucy v. Railway Co.*, 64 Minn. 7, 31 L. R. A. 551, 65 N. W. Rep. 944 (use of profane language towards a lady after conductor failed to interfere on complaint); *Railroad Co. v. Jefferson*, 89 Ala. 554, 16 S. E. Rep. 69, 32 Am. St. Rep. 87, 17 L. R. A. 571 (abuse of negro passenger by drunken men); *Railway v. Flake*, 114 Tenn. 671, 88 S. W. Rep. 326 (boy shot by drunken passengers who had been shooting off dynamite sticks); *Railroad Co. v. Henderson* (Tex. Civ. App.), 82 S. W. Rep. 1065 (negro compelled to

such power, and they are just as responsible for its proper exercise as they are for the proper running of the train.”⁷

Sec. 985. (§ 551.) Same subject—Duty of carrier to guard against careless use of firearms.—The carrier is also bound to exercise the utmost vigilance in guarding against the negligent and careless use of firearms, and in a number of cases the carrier has been held liable for injuries to passengers, resulting from their use, which might reasonably have been anticipated or naturally expected to have occurred in view of all the circumstances and of the number and character of the persons on the carrier’s vehicle.⁸ This rule was first applied in *Flint v. The Transportation Company*.⁹ In that case a number of disorderly soldiers were upon the boat, as the plaintiff went upon it after he had engaged his passage, through a crowd of whom he had to pass. As he did so, a musket in the hands of one of them was accidentally discharged, the ball from which struck the plaintiff and wounded him severely. It was not shown that the officers of the boat made any effort to quiet or remove these disorderly persons, or to warn the passengers of

dance, by drunken passengers, at point of revolver); *Railway Co. v. Sherbert* (Tex. Civ. App.), 42 S. W. Rep. 639 (use of indecent language before ladies after a vain complaint to the conductor).

In *Blain v. Railway Co.*, 5 Ont. L. R. 334, 2 Canadian Ry. Cases, 85, *affirmed* in *Railway Co. v. Blain*, 34 S. C. R. 74, 3 Canadian Ry. Cases, 143, a passenger was assaulted several times by a drunken man. The conductor was informed of the assaults, but refused to do anything, and a judgment on the verdict of the jury was affirmed in favor of the plaintiff. Evidence of the improper relations between the plaintiff and the wife of his assailant, alleged as provocation for the assaults, was held to have been properly

rejected, for if the plaintiff was conducting himself properly on the train, he was entitled to the same measure of protection as any other passenger.

7. *Pittsburgh, etc., R. R. v. Pillow*, 76 Penn. St. 510.

8. *Northern Commercial Co. v. Nestor*, — C. C. A. —, 133 Fed. 383; *Wright v. Railroad Co.*, 4 Colo. App. 102, 35 Pac. Rep. 196; *Railroad Co. v. McEwan*, 21 Ky. L. R. 487, 51 S. W. Rep. 619; *Railway v. Flake*, 114 Tenn. 671, 88 S. W. Rep. 326; *West Memphis Packet Co. v. White*, 99 Tenn. 256, 41 S. W. Rep. 583, 38 L. R. A. 427.

See also, *Railway Co. v. Long*, 13 Tex. Civ. App. 664, 36 S. W. Rep. 485.

9. 6 Blatch. 158; 34 Conn. 554.

the danger. The trial court, in charging the jury, laid down the above rule which was held correct on appeal.

So in the case of *The New Orleans, etc. Railroad v. Burke*,¹⁰ the facts were that the passenger was taunted and abused by a disorderly crowd of men upon the train, and was finally shot and wounded by one of them, and the conductor, so far from having used all the efforts in his power to quell the disturbance, showed timidity, shrank from his duty, and retreated from the scene of the difficulty while it was in progress. An action for the injury was brought against the company, and the jury having found a verdict for the plaintiff, it was sustained in the appellate court, Chalmers, J., after a learned discussion of the question of the degree of the responsibility of the carrier in such cases, stating the law to be that "the undoubted power which is vested in railroad officials to preserve peace and good order on their trains, and, if necessary for this purpose, to eject therefrom turbulent and disorderly persons, carries with it the absolute duty to exercise the power when called upon so to do in a proper case by the other passengers; that a failure to discharge this duty stands, to some extent, upon the same footing as the omission to perform any other official duty, and, upon the maxim *respondeat superior*, renders the corporation liable."

But in such instances the duty of the carrier is fulfilled when he has exercised the force at his command to prevent injury, and if an injury follows when the carrier has so performed his duty, he is not guilty of any wrong and consequently cannot be held liable.¹¹

Sec. 986. Same subject—Carrier's duty to protect passengers from injuries by strikers.—A railway company is not guilty of negligence in attempting to operate its cars during a strike of its employes, unless the conditions are such that it

¹⁰ 53 Miss. 200. But in a later case the court dissent from this road Co., 67 Miss. 376, 7 S. Rep. 320.

salutary doctrine and announce 11. *Fall v. Steam Packet Co.*, 90 their intention to review it when Md. 248, 44 Atl. Rep. 1007, 47 L. occasion offers. *Royston v. Rail- R. A. 120; Railway Co. v. Boyle*,

knows, or ought reasonably to anticipate, that it cannot do so and at the same time guard from violence, by the exercise of the utmost care on its part, those who accept its implied invitation to become passengers. Nor will it be guilty of negligence if it fails to avail itself of extraordinary precautions or means of protection not commonly employed, such as pulling down the blinds of the car or stretching heavy canvas over the windows outside the car in order to better protect those within from objects thrown by a mob, for it is chargeable with only ordinary care and prudence to guard against the lawless acts of third persons not under its direct control.¹²

On the other hand, a railroad company cannot invite trouble by needlessly receiving into its train with other passengers men whom it has good reason to believe will expose the occupants of the car to injuries on account of enmity between them and strikers. In *Chicago, etc. Railroad Co. v. Pillsbury*,¹³ the railroad company stopped its train at a station where a strike was in progress and received into one of its cars with the other passengers a number of men who had been imported to take the place of strikers in a large manufacturing establishment. Against these men the strikers manifested the greatest indignation and were prevented from doing them violence only by the presence of armed guards. After receiving them on board, the train ran on a short distance further, when it stopped before crossing another road. Immediately upon its stopping it was boarded by a mob of the strikers, who began an assault with clubs, stones and pistols upon the imported operatives in the car, and in the melee that ensued the plaintiff, who was a passenger upon the train, was seriously injured. For this injury the company was held liable, on the ground that by stopping its train and receiving into its cars these men whose presence it had good reason to believe would provoke attack, it had negligently and wrongfully exposed its other passengers to injury.

115 Ga. 836, 42 S. E. Rep. 242, 59 Minn. 336, 93 N. W. Rep. 127, 97 L. R. A. 104. Am. St. Rep. 519, 60 L. R. A. 601.

12. *Fewings v. Mendenhall*, 83 13. 123 Ill. 9.

Sec. 987. Same subject—Duty of carrier to protect passenger from arrest.—The carrier is not required to resist an officer of the law who has apparent authority to arrest a passenger, nor is he under any duty to inquire into the legality of the arrest, or to see that the officer uses only such force as is necessary to make the arrest. If he has notice that the arrest is wrongful, it would be his duty to make inquiry into the matter, and, if justified, to interfere. But where the arrest is by officers of the law and is apparently regular, and there is nothing to put the carrier on notice that the arrest is illegal, the carrier will not be bound to interfere with the officers and prevent the arrest. Having a right to presume that the arrest is legal, his obeying the command of the officers is no breach of duty to the passenger.¹⁴

Sec. 988. Same subject—Duty of carrier to protect its passengers against acts of violence by passengers who have been ejected or who have alighted.—The duty of the carrier to protect its passengers is not limited to conduct exhibited in the interior of its vehicles, but applies as well to assaults by passengers who have been ejected or who have alighted from them. And if injury to passengers is threatened from outside of the train of a railroad company, it should be averted precisely the same as if impending on any of the company's platforms or in any of its apartments. It would be a lame rule, it is said, which required nothing more than that a vicious person should be put off the train and then left raging up and down its length, throwing missiles through its windows.¹⁵ But it will be necessary, in order to charge the railroad company with liability, that its servants knew, or under the circumstances should have known that injury to passengers in its vehicles from such a cause was threatened or impending.¹⁶

14. *Railroad Co. v. Ponder*, 117 Ga. 63, 43 S. E. Rep. 430, 97 Am. St. Rep. 152, 60 L. R. A. 713; *Owens v. Railroad Co.*, 126 N. C. 139, 35 S. E. Rep. 259, 78 Am. St. Rep. 642.

15. *Spangler v. Railway Co.*, 68 Kan. 46, 74 Pac. Rep. 607, 63 L. R. A. 634, 104 Am. St. Rep. 391.

16. *Brown v. Railway Co.*, 139 Fed. 972, — C. C. A. —.

Sec. 989. Same subject—Duty of carrier to protect passenger while in station or depot.—The authority of carriers of passengers to make and enforce such reasonable regulations as are necessary to protect from annoyance, insult or injury those who are invited to their depots or stations to become passengers, cannot be questioned. And the wilful or negligent failure to make and enforce such reasonable regulations will render them liable in damages for any injuries directly resulting to persons who repair there for the purpose of becoming passengers. But since such carriers are required to exercise only ordinary care to protect their passengers, or those intending to become such, from the turbulent or disorderly conduct of persons in their depots, it must appear, in order to establish a liability against a carrier where an injury has arisen from such a source, that the agent in charge of the station knew, or had opportunity to know, that the injury was threatened, and that by prompt intervention he could have prevented or mitigated it.¹⁷ If, however, an agent in charge

17. *Railway Co. v. Wilson*, 70 Ark. 136, 66 S. W. Rep. 661, 91 Am. St. Rep. 74; *Railroad Co. v. Laloge*, 24 Ky. L. R. 693, 696, 69 S. W. Rep. 795, 62 L. R. A. 405; *Prokop v. Railway Co.* (Tex. Civ. App.), 79 S. W. Rep. 101 (female passenger assaulted by negro while waiting in depot for train which was two hours late).

Notice to an employe whose only duties are to clean up the waiting-room and keep up fires, but who is charged with no duty of looking after passengers, is insufficient to bind the carrier. *Tate v. Railroad Co.*, 26 Ky. L. R. 309, 81 S. W. Rep. 256.

A station master ought to do whatever he reasonably can for the purposes of justice when informed that a robbery, or other crime, has been committed in one

of the company's carriages; and a contrary course of conduct would be highly censurable if no reasonable explanation of it could be given. But it is no breach of the duty owed by the company to a passenger to start the train at the time appointed without waiting till the passenger can give the men whom he charges with robbery into custody, and have them searched. Starting a train in the ordinary course is not opposing an obstacle to the recovery of the passenger's property of such a kind as to make the company responsible in the same way as if its negligence had caused or contributed to the robbery. *Cobb v. Railway Co.*, L. R. (1894) App. Cas. 419, 63 L. J. Q. B. 629, *affirming* (1893) 1 Q. B. 459, 62 L. J. Q. B. 335.

of the station stands by, and allows a passenger, or one intending to become such, to be insulted or injured without any attempt on his part to prevent the wrongful act, the carrier will certainly be liable.¹⁸ So if he fails to guard against the long continued and notorious acts of third persons, such as scuffling in the passageways by cabmen, and a passenger is thereby injured, the carrier must respond in damages.¹⁹

Sec. 990. (§ 553.) Difference between passenger and stranger or trespasser as to degree of care and diligence to be used.—The carrier is not under the same degree of obligation as to care and diligence to guard against injuries to strangers as he is in case of those against passengers. His duty to the former is governed by the general principle of law that every one is obliged, upon considerations of humanity and justice, to conform his conduct to the rights of others, and in the prosecution of his lawful business to use every reasonable precaution to avoid their injury.²⁰ But to his passengers is due that ut-

18. *Buck v. Railway Co.*, 15 Daly, 550; *Seawell v. Railroad Co.*, 132 N. C. 856, 44 S. E. Rep. 610, 45 S. E. Rep. 850 (carrier held liable where plaintiff was pelted with eggs, the station agent making no effort to prevent the assault); *Penny v. Railroad Co.*, 133 N. C. 221, 45 S. E. Rep. 563, 63 L. R. A. 497 (carrier held liable where persons were engaged in altercation with pistols near the car steps, and plaintiff was shot while alighting, carrier's servants having given no warning of danger); *Railway Co. v. Jones* (Tex. Civ. App.), 39 S. W. Rep. 124 (carrier held liable for station agent's failure to stop the use of insulting language to a lady in his presence); *Railway Co. v. Phillio*, 96 Tex. 18, 69 S. W. Rep. 994, 97 Am. St. Rep. 868, 59 L. R. A. 392, *reversing* (Tex. Civ. App.)

67 S. W. Rep. 915 (carrier held liable for failure of station agent to restrain drunken man who flourished a knife and sang vulgar songs in his presence); *Railway Co. v. Dick*, 26 Tex. Civ. App. 256, 63 S. W. Rep. 895 (carrier held liable for assault on plaintiff where station agent knew of such assault).

19. *Exton v. Railroad Co.*, 62 N. J. Law, 7, 42 Atl. Rep. 486, 56 L. R. A. 508; *s. c.* 63 N. J. Law, 356, 46 Atl. Rep. 1099.

20. "A common carrier of passengers is not under the same obligation as to care and diligence in guarding against injuries to strangers, and especially to trespassers, that it is in guarding against injuries to passengers. His duty to the latter involves the use of the utmost care and diligence which can be bestowed by human

most care and diligence which can be bestowed by human skill and foresight, and consequently that which would be cul-

skill and foresight, and is enforced by the highest considerations of public policy. But as to the former, his duty rests merely upon grounds of general humanity and respect for the rights of others, and requires him to so perform the transportation service as not wantonly or carelessly to be an aggressor towards third persons, whether such persons are on or off the vehicle." Chicago, etc., R. Co. v. Mehlsack, 131 Ill. 61.

See, also, Singleton v. Felton, 101 Fed. 526, 42 C. C. A. 57; Railway Co. v. Shaw, 86 Fed. 865, 31 C. C. A. 70; Tully v. Railroad Co., 3 Pennewill (Del.), 455, 50 Atl. Rep. 95; Railroad Co. v. Leiner, 202 Ill. 624, 67 N. E. Rep. 398, 95 Am. St. Rep. 266, *affirming* 103 Ill. App. 438; Railroad Co. v. Kingsley, 177 Ill. 558, 52 N. E. Rep. 931, *reversing* 78 Ill. App. 236; Barkley v. Railway Co., 37 Ill. App. 293; Railroad Co. v. Reagan, 52 Ill. App. 488; Railroad Co. v. Redding, 140 Ind. 101, 39 N. E. 921, 34 L. R. A. 767; Railroad Co. v. Norris, 17 Ind. App. 189, 46 N. E. Rep. 554, 60 Am. St. Rep. 166; Railroad Co. v. Matthews, 13 Ind. App. 355, 41 N. E. Rep. 842; Mendenhall v. Railway Co., 66 Kan. 438, 71 Pac. Rep. 846, 61 L. R. A. 120, 97 Am. St. Rep. 380; Handley v. Railway Co., 61 Kan. 237, 59 Pac. Rep. 271; Railway Co. v. Mitchell, 56 Kan. 324, 43 Pac. Rep. 244; Railway Co. v. Sanford, 45 Kan. 372, 25 Pac. Rep. 891, 11 L. R. A. 432; Railroad Co. v. Gatewood, 14 Ky. L. Rep. 108; Railroad Co. v. Moss, 13 Ky. L. Rep. 684; Dalton's Adm'r

v. Railroad Co., 22 Ky. L. R. 97, 56 S. W. Rep. 657; Railroad Co. v. McManus' Adm'r, 24 Ky. L. Rep. 81, 67 S. W. Rep. 1000; Railroad Co. v. Jackson, 22 Ky. L. Rep. 630, 58 S. W. Rep. 526; Railroad Co. v. Kennery's Adm'r, 23 Ky. L. Rep. 1734, 66 S. W. Rep. 20; Fagg's Adm'r v. Railroad Co., 23 Ky. L. Rep. 383, 63 S. W. Rep. 580; Leonard v. Railroad Co., 170 Mass. 318, 49 N. E. Rep. 621; Planz v. Railroad Co., 157 Mass. 377, 32 N. E. Rep. 356, 17 L. R. A. 835; Railroad Co. v. Burnsed, 70 Miss. 437, 12 So. Rep. 958, 35 Am. St. Rep. 656; Krueger v. Railway Co., 84 Mo. App. 358; Choate v. Railway Co., 67 Mo. App. 105; Merrie-jees v. Railroad Co., 163 Mo. 470, 63 S. W. Rep. 718; Welsh v. Railroad Co., 62 N. J. Law, 655, 42 Atl. Rep. 736; Barrett v. Railroad Co., 61 N. Y. Supp. 9, 45 App. Div. 225; s. c. 157 N. Y. 663, 52 N. E. Rep. 659, *reversing* 36 N. Y. Supp. 1121, 92 Hun, 606; Murphy v. Railroad Co., 92 N. Y. Supp. 192; Enright v. Railroad Co., 198 Pa. St. 166, 47 Atl. Rep. 938, 82 Am. St. Rep. 795, 53 L. R. A. 330; Elkins v. Railroad Co., 64 S. Car. 553, 43 S. E. Rep. 19; Railroad Co. v. Hewitt, 67 Tex. 479; Blake v. Railway Co. (Tex. Civ. App.), 85 S. W. Rep. 430; Railroad Co. v. Grigsby, 13 Tex. Civ. App. 639, 35 S. W. Rep. 815, 36 S. W. Rep. 496; Claiborne v. Railway Co., 21 Tex. Civ. App. 648, 57 S. W. Rep. 336; Crawleigh v. Railway Co., 28 Tex. Civ. App. 260, 67 S. W. Rep. 140; Krantz v. Railway Co., 12 Utah, 104, 41 Pac. Rep. 717, 30 L. R. A.

pable negligence in the case of the passenger would not be necessarily so in the case of one to whom the carrier was under no such peculiar obligation.²¹ It therefore becomes important in many cases, where injuries have been sustained by others from the improper or negligent management of his business by the carrier or his agents, to determine whether, at the time of such injury, the injured person stood in the rela-

297; *Stone v. Railway Co.*, 88 Wis. 98, 59 N. W. Rep. 457; *Bolin v. Railway Co.*, 108 Wis. 333, 84 N. W. Rep. 446, 81 Am. St. Rep. 911; *Pledger v. Railroad Co.*, — Neb. —, 95 N. W. Rep. 1057; *Graham v. Railway Co.*, — Iowa, —, 107 N. W. Rep. 595. (No duty owed a trespasser unless his position of danger is known to operatives of train, and then only to use reasonable care.)

On the authority of a railroad conductor to eject trespassers, see *Sanders v. Railroad Co.*, 90 Ill. App. 582; *Young v. Railway Co.*, 51 La. Ann. 295, 25 So. Rep. 69; *Rowell v. Railroad Co.*, 68 N. H. 358, 44 Atl. Rep. 488; *Railroad Co. v. Anderson*, 82 Tex. 516, 17 S. W. Rep. 1039, 27 Am. St. Rep. 902; *Railroad Co. v. Bender*, 24 Tex. Civ. App. 133, 57 S. W. Rep. 574.

There is a sharp division of opinion on the question whether a brakeman has implied authority to eject trespassers. Some courts hold that he has, others that he has not. The two lines of cases are irreconcilable. For the varying views in the different states, see *Railway Co. v. Godkin*, 104 Ga. 655, 30 S. E. Rep. 378, 69 Am. St. Rep. 187; *Railroad Co. v. Brackman*, 78 Ill. App. 141; *Railroad Co. v. King*, 179 Ill. 91, 53 N. E. Rep. 552, 70 Am. St. Rep. 95, *affirming* 77 Ill. App. 581;

Johnson v. Railway Co., 116 Iowa, 639, 88 N. W. Rep. 811; *O'Banion v. Railway Co.*, 65 Kan. 352, 69 Pac. Rep. 353; *Elliott v. Railroad Co.*, 21 Ky. L. Rep. 630, 52 S. W. Rep. 833; *Smith v. Railroad Co.*, 95 Ky. 11, 23 S. W. Rep. 652, 22 L. R. A. 72; *Dorsey v. Railway Co.*, 104 La. 478, 29 So. Rep. 177, 52 L. R. A. 92; *McKeon v. Railroad Co.*, 183 Mass. 271, 97 Am. St. Rep. 437, 67 N. E. Rep. 329; *Hartigan v. Railroad Co.*, 113 Mich. 122, 71 N. W. Rep. 452; *Randall v. Railway Co.*, 113 Mich. 115, 71 N. W. Rep. 450, 38 L. R. A. 666; *Railroad Co. v. West*, 22 Ky. L. Rep. 387, 60 S. W. Rep. 290; *Brevig v. Railway Co.*, 64 Minn. 168, 66 N. W. 401, 404; *Krueger v. Railway Co.*, 84 Mo. App. 358; *Brennan v. Santa Fe Receivers*, 72 Mo. App. 107; *Farber v. Railway Co.*, 139 Mo. 272, 40 S. W. Rep. 932; *Railroad Co. v. Welsh*, 62 N. J. L. 655, 72 Am. St. Rep. 659, 42 Atl. Rep. 736; *Railway Co. v. Black*, 23 Tex. Civ. App. 119, 57 S. W. Rep. 330; *Railway Co. v. Lester*, 24 Tex. Civ. App. 467, 59 S. W. Rep. 946; *Railway Co. v. Rutherford*, 94 Tex. 518, 62 S. W. Rep. 1056, 62 S. W. Rep. 1069; *Cook v. Railway Co.*, 128 N. C. 333, 38 S. E. Rep. 925.

21. *Brand v. Railroad Co.*, 8 Barb. 368; *Virginia, etc., R. Co. v. Sanger*, 15 Gratt. 230.

tion of passenger or of stranger to him, and upon the determination of this question his liability may frequently depend.

Sec. 991. (§ 553a.) Same subject—Duty to persons coming to stations to assist passengers.—A person who comes to a railroad station to assist passengers in entering or leaving the train, though not a passenger, is not a trespasser, as he comes with at least the tacit invitation of the carrier.²² While so engaged, he does not stand in the relation to the carrier of a bare licensee, but is deemed to have been invited to be there by virtue of the relation existing between the carrier and the intending or arriving passenger. The carrier, therefore, owes to him the duty of exercising at least ordinary care to see that

22. McKone v. Railroad Co., 51 Mich. 601; Grand Rapids, etc., R. Co. v. Martin, 41 Mich. 667; Doss v. Railroad Co., 59 Mo. 27; Griswold v. Railroad Co., 64 Wis. 652; Central, etc., R. Co. v. Letcher, 69 Ala. 106; Holmes v. Railway Co., L. R. 4 Exch. 254; Tobin v. Railroad Co., 59 Me. 183; Gillis v. Railroad Co., 59 Penn. St. 129; Railway Co. v. Owens, 123 Ga. 393, 51 S. E. Rep. 404; Berry v. Railroad Co., 22 Ky. L. R. 1410, 60 S. W. Rep. 699; Railway Co. v. Lawton, 55 Ark. 428, 18 S. W. Rep. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48; Klugherz v. Railway Co., 90 Minn. 17, 95 N. W. Rep. 586, 101 Am. St. Rep. 384; Whitley v. Railway Co., 122 N. Car. 987, 29 S. E. Rep. 783; Morrow v. Railway Co., 134 N. Car. 92, 46 S. E. Rep. 12; Cherokee Packet Co. v. Hilson, 95 Tenn. 1, 31 S. W. Rep. 737; Dowd v. Railway Co., 84 Wis. 105, 54 N. W. Rep. 24, 20 L. R. A. 527, 36 Am. St. Rep. 917.

In Railway Co. v. Bruyere, 114 Fed. 540, 51 C. C. A. 574, plaintiff went to the station to meet his wife who was expected to re-

turn on defendant's freight train. Before the train arrived, he heard that it had been taken possession of by a crowd of rioters. When the train arrived at the station, considerable excitement ensued which attended the arrest of the rioters. He did not see his wife and boarded the caboose with a view to obtaining information concerning his wife. The conductor was not in the caboose, and as he supposed he would return shortly, plaintiff awaited his return. The train started up and plaintiff supposed it was going to the coal shed to coal up, but it did not stop there and continued to increase in speed. The conductor then came along and insisted on him getting off the train or paying his fare, but refused to stop the train to allow him to get off. Plaintiff stepped outside the door to the rear platform, whereupon the conductor followed him and immediately closed the door and fastened it. Plaintiff attempted to re-enter, but could not, and was thrown from the train by the lurching of the caboose. The ac-

he is not injured by reason of defective station facilities or approaches thereto.²³

So one who goes upon a train to render necessary assistance to a passenger, in conformity with a practice approved or acquiesced in by the carrier, has a right to render the needed assistance and leave the train; and the carrier, in permitting him to enter with knowledge of his purpose, is presumed to agree that he may execute it, and is bound to hold the train a reasonable time therefor. If he is injured by reason of the sudden starting of the train or the omission to give the customary signals, the carrier will be liable.²⁴ But the duty of

tion of the conductor was held the proximate cause of his injury, and the railroad company was held liable in damages.

23. *McKone v. Railroad Co.*, 51 Mich. 601; *Railway Co. v. Tomlinson*, 69 Ark. 489, 64 S. W. 347; *Railway Co. v. Owens*, 123 Ga. 393, 51 S. E. Rep. 404; *Railroad Co. v. Mushrush*, 11 Ind. App. 192, 37 N. E. 954.

See, also, *Railroad Co. v. Spencer*, 27 Colo. 313, 61 Pac. Rep. 606, 51 L. R. A. 151 (truck placed in such a position on platform that it was struck by passing car and hurled against plaintiff's intestate, fatally injuring him; carrier held liable); *Galloway v. Railway Co.*, 56 Minn. 346, 57 N. W. Rep. 1058, 23 L. R. A. 442 (carrier held liable for injury due to notorious practice of mail clerks to throw mail bags from car onto platform); *Izlar v. Railroad Co.*, 57 S. C. 332, 35 S. E. Rep. 583 (carrier held liable for unsafe condition of station approach); *Railway Co. v. Russell* (Tex. Civ. App.), 74 S. W. Rep. 569 (carrier held liable for injuries due to brakeman on side of passing

freight train swinging his body out and striking plaintiff).

In *Railway Co. v. Williams*, 21 Tex. Civ. App. 469, 51 S. W. Rep. 653, the carrier was held liable for injuries due to his not lighting the platform properly. But see, *contra*, *Dowd v. Railway Co.*, 84 Wis. 105, 54 N. W. Rep. 24, 36 Am. St. Rep. 917, 20 L. R. A. 527.

In *Railway Co. v. Phillio*, 96 Tex. 18, 69 S. W. 994, 59 L. R. A. 392, 97 Am. St. Rep. 868, *reversing* (Tex. Civ. App.), 67 S. W. Rep. 915, the court held that railroad companies owe no duty to third persons coming to stations with passengers to protect them from the assaults of third persons on their premises.

24. *Railway Co. v. Lawton*, 55 Ark. 428, 29 Am. St. Rep. 48, 18 S. W. Rep. 543, 15 L. R. A. 434; *Railroad Co. v. Athon*, 6 Ind. App. 295, 33 N. E. Rep. 469, 51 Am. St. Rep. 303; *Davis v. Railway Co.*, 132 N. C. 291, 43 S. E. Rep. 840; *Morrow v. Railway Co.*, 134 N. Car. 92, 46 S. E. Rep. 12; *Railway Co. v. Miller*, 15 Tex. Civ. App. 428, 39 S. W. Rep. 583; *Railroad Co. v. Crunk*, 119 Ind. 542, 21 N. E. Rep.

the carrier in this respect is dependent upon the knowledge of such person's purpose by those in charge of the train, for without such knowledge they may reasonably conclude that he entered to become a passenger, and cause the train to be moved after giving him a reasonable time to get aboard. He should, accordingly, notify someone in the management of the train of his presence, business or purpose, so as to create some relation to the carrier and thus make it its duty to care for him. And where the carrier's servants have no knowledge, or there are no circumstances tending to put them on notice that a person who has boarded a train to assist another intends to alight before the train starts, they are not bound to hold the train until he has had time to disembark, nor to notify him before the train is started.²⁵

Sec. 992. Duty of carrier toward sick, aged and disabled passengers.—The carrier is not required to accept upon its

31, 12 Am. St. Rep. 443; *Seaboard, etc., Ry. Co. v. Bradley*, — Ga. —, 54 S. E. Rep. 69.

Where there is no necessity for a person accompanying a passenger to go upon the train, as, for instance, where the passenger is not ill or feeble and does not require assistance, the carrier only owes him the duty of ordinary care. *Berry v. Railroad Co.*, 22 Ky. L. Rep. 1410, 60 S. W. Rep. 699.

A person who enters a passenger coach, accompanying a friend or relative for the purpose of assisting him or her, and finds the first coach crowded, cannot pass from car to car and expect the conductor to hold the train until he alights. *Railroad Co. v. Espenschild*, 17 Ind. App. 558, 47 N. E. Rep. 186.

If the injury is caused by an attempt to leave the train while in

motion, there can be no recovery. *Flaherty v. Railroad Co.*, 186 Mass. 567, 72 N. E. Rep. 66.

25. *Railway Co. v. Lawton*, 55 Ark. 428, 18 S. W. Rep. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48; *Railway Co. v. Hutchins*, 121 Ga. 304, 48 S. E. Rep. 939; *Berry v. Railroad Co.*, 22 Ky. L. R. 1410, 60 S. W. Rep. 699; *Yarnell v. Railroad Co.*, 113 Mo. 570, 21 S. W. Rep. 1, 18 L. R. A. 599; *Saxton v. Railroad Co.*, 98 Mo. App. 494, 72 S. W. Rep. 717; *Johnson v. Railway Co.*, 53 S. Car. 203, 31 S. E. Rep. 212, 69 Am. St. Rep. 849; *Railway Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. Rep. 905; *Oxsher v. Railway Co.*, 29 Tex. Civ. App. 420, 67 S. W. Rep. 550; *Dillingham v. Pierce* (Tex. Civ. App.), 31 S. W. Rep. 203; *Railroad Co. v. Letcher*, 69 Ala. 106; *Coleman v. Railroad Co.*, 84 Ga. 1, *modifying Stiles v. Railroad Co.*,

cars, without an attendant, persons who because of some physical or mental infirmity are incapable of properly caring for themselves.²⁶ The carrier, it has been said, is under no duty to turn his vehicles into hospitals or his employees into nurses for the care of such passengers. But if an unattended person who is so sick, aged, or otherwise infirm as to be unable to assist or care for himself, be accepted as a passenger, the carrier, if he has notice of the passenger's condition, is bound to exercise for his safety a degree of care commensurate with the responsibility assumed, and that would be such care as would be reasonably necessary to protect him from injury in view of his physical or mental condition.²⁷ And if the pas-

65 Ga. 370); *McLaren v. Railroad Co.*, 85 Ga. 504, 11 S. E. Rep. 840; *Griswold v. Railroad Co.*, 64 Wis. 652; *Hill v. Railroad Co.*, — Ga. —, 52 S. E. Rep. 651; *Seaboard, etc., Ry. Co. v. Bradley*, — Ga. —, 54 S. E. Rep. 69.

It would be unreasonable to require the carrier's servant to forbear from giving a signal that the train could proceed, simply because he saw a person walking in the aisle of a car, or coming out onto the platform thereof, for those are common practices of passengers who have no intention of leaving the train, even though it be at a standstill in a station. *Dunne v. Railroad Co.*, 91 N. Y. Supp. 145, 99 App. Div. 571.

But when a gentleman is seen on the platform of a railway station accompanied by two ladies at the hour of 4 a. m., awaiting the arrival of a train, and, as soon as it arrives, he conducts one of the ladies into the coach, and leaves the other alone on the platform, there is a reasonable conclusion that he does not intend to remain upon the train, but that he will

return to the lady left unattended on the platform. *Railroad Co. v. Satterwhite*, 19 Tex. Civ. App. 170, 47 S. W. Rep. 41.

26. See *ante*, sec. 966 *et seq.*

27. *Croom v. The Railway*, 52 Minn. 296, 53 N. W. Rep. 1128, 38 Am. St. Rep. 557, 18 L. R. A. 602; *International, etc., R. Co. v. Gilmer*, 18 Tex. Civ. App. 682, 45 S. W. Rep. 1028; *St. Louis, etc., Ry. Co. v. Finley*, 79 Tex. 85, 15 S. W. Rep. 266; *Foss v. The Railroad*, 66 N. H. 256, 21 Atl. Rep. 222; *Sheridan v. The Railroad*, 36 N. Y. 39; *Railroad Co. v. Earwood*, 104 Ga. 127, 29 S. E. Rep. 913; *Brady v. The Railroad*, 162 Mass. 408, 38 N. E. Rep. 710; *Mathew v. The Railroad*, 115 Mo. App. 468, 78 S. W. Rep. 271; *Young v. The Railway*, 93 Mo. App. 267; *Hanks v. The Railroad*, 60 Mo. App. 274.

It is reasonable and just to hold that if persons, who are so sick and disabled as to require assistance, desire to travel upon public conveyances, they should provide themselves with the assistance needed. *Louisville, etc., R. Co. v. Fleming*, 14 Lea, 128; *Sevier v.*

senger should be so unfortunate as to become sick while upon the journey, and in consequence less able to look after himself, he would not thereby be put beyond the pale of care and protection, and it would be the duty of the carrier, if the passenger's condition were made known to him, to give him such care and protection beyond that demanded under ordinary circumstances as would be reasonably practicable, with the facilities at hand, without unduly delaying the train or un-

The Railroad, 61 Miss. 8. So if they desire immunities or amenities because of sickness, they should make their sickness known. *Lemont v. The Railroad*, 1 Mackey, 180. Compare this case with that of *Conolly*, 41 La. Ann. 57, *post*. Notice to one conductor that a passenger is in feeble health is notice to the company, and it is not contributory negligence in the passenger not to repeat it to every conductor. *Foss v. Railroad Co.*, *supra*.

Where the carrier knowingly undertakes to carry a passenger so sick or disabled as to require assistance, he is bound to afford the assistants, though volunteers, a reasonable time to put the passenger on the train and then to leave in safety. *Louisville, etc., R. Co. v. Crunk*, 119 Ind. 542. See also, *Lucas v. Railroad Co.*, 6 Gray, 64.

In *Weightman v. The Railway*, 70 Miss. 563, 12 So. Rep. 586, 35 Am. St. Rep. 660, 19 L. R. A. 671, the conductor, after being informed of the serious illness of the passenger and of the necessity there would be of assisting him from the train at his destination, received him upon the train. When the train reached the passenger's destination, he was un-

conscious, and the conductor, failing to put him off, he was carried to a small station about thirty miles farther on, where he was put off the train. It was about 2 o'clock in the morning and no one was present at the depot to care for him. After remaining in the depot for about forty hours, he was placed upon one of the carrier's trains and returned to his destination. From the effects of the exposure, he soon thereafter died. It was held that the carrier, after having been informed of the passenger's condition, was bound to treat him humanely and with consideration; that while it was not bound to receive the passenger in such condition upon its train, yet having done so with knowledge of his inability to care for himself, it was liable for having failed to exercise due care to protect him from injury.

Where the conductor is informed of the helpless condition of a female passenger, and agrees to help her from the train at her destination, and in carrying her hastily through the door he negligently causes her arm to strike the door facing, thereby breaking her arm, the carrier will be liable. *International, etc., R. Co. v. Gilmer*, *supra*.

reasonably interfering with the safety and comfort of the other passengers.²⁸ But, as reasonable as this seems, it has been disputed, and the position has been taken that all the accommodation or assistance extended to a sick passenger is purely a matter of courtesy on the part of the carrier, and not at all incumbent upon him in the line of his public duty.²⁹ This latter position, however, cannot be sustained.

Nor can the passenger, who is taken sick while on the journey, and is thus rendered unable to properly care for himself, be put off the vehicle and left unprotected by the way, but reasonable care and diligence must still be exerted to protect him from injury and prevent further ills than those already inflicted upon him. The duty of the carrier under such circumstances does not end with his removal from the vehicle, but reasonable care must still be used in temporarily providing

28. *McCann v. The Railway*, 58 N. J. Law, 642, 34 Atl. Rep. 1052, 33 L. R. A. 127; *Railway Co. v. Salzman*, 52 Ohio St. 558, 40 N. E. Rep. 891, 49 Am. St. Rep. 745, 31 L. R. A. 261.

Where a passenger who had gotten into the caboose of a freight train, supposing he had a right to ride there, was put off between two stations because it was contrary to a regulation of the company to carry passengers upon such trains, when he was sick and after he had so informed the conductor and offered to pay his fare, the act was said by the court to have been done under aggravated circumstances, and a verdict for the plaintiff, although for a large amount, was permitted to stand. *Illinois Cent. R. R. v. Sutton*, 53 Ill. 397.

In *Wells v. The Railroad*, 49 N. Y. Supp. 510, 25 App. Div. 365, it appeared that a person having a ticket showed it to the gateman

who told him to sit down and when his train arrived he would notify him. While sitting there, it was apparent that he was ill and not in his right mind. His train came and departed, but he was not notified by the gateman of its arrival, and when the gateman saw that he was left he told a policeman at the station to put the sick man out of the depot. He was put out, and wandered back on the track and was killed. It was held that he was a passenger, and that if he was too ill to travel with safety, it was the duty of the carrier not to undertake to carry him, but to put him in a place of safety or in the custody of some officer of the law authorized to take charge of such persons; that it had failed to do so and was therefore liable for his death.

29. *New Orleans, etc., R. R. v. Statham*, 42 Miss. 607.

for his safety.³⁰ In *The Railway Co. v. Parry*,³¹ it appeared that the conductor, while passing through the train, observed that the passenger was ailing with what seemed to him to be a fit. On the arrival of the train at the next station, the conductor called the depot-master to his assistance and together they removed the passenger from the train, the conductor directing the depot-master to see that he was put upon a later train and taken to his destination. The depot-master tried to converse with the passenger, but elicited nothing but groans and unintelligible replies. It seemed, however, to the depot-master that he desired to go on his way, so, after assisting him to put on his coat, he was allowed after a few moments to take his course without further attention. From the depot he wandered to a point on the railway track, some five miles away, where he was run over and killed by a train. The negligence complained of was the failure on the part of the carrier to exercise proper care and caution in protecting the passenger after his removal from the train. It was held that while the carrier was not required to keep hospitals or nurses for sick or insane passengers, yet, if it had notice that a passenger was in a helpless condition, it was under the duty of exercising the reasonable and necessary offices of humanity toward him, until some suitable provision for his safety could be made; that the jury by its verdict had found that the depot-master had failed to exercise reasonable care in pro-

30. See this duty forcibly stated in *Conolly v. Railroad Co.*, 41 La. Ann. 57, where a passenger upon a street car was suddenly stricken with paralysis. He fell into the aisle and vomited, and the driver, who claimed that he thought the passenger was drunk, put him off upon the sidewalk and left him lying there uncared for for four hours on a drizzling cold December day. The passenger died and the carrier was held liable.

Where a sick passenger was ejected from the train on a cold night at a flag station where there was neither depot nor light provided, and he was found dead the next morning, having died from exposure to the elements, it was held that the carrier was liable. *Eidson v. The Railway*, — Miss. —, 23 So. Rep. 369.

31. 67 Kan. 515, 73 Pac. Rep. 105.

viding for the passenger's protection, and that the carrier was therefore liable.

Sec. 993. Same subject—Blind and deaf passengers.—As to the blind and the deaf, if their condition is known to the carrier, the same reasons which require more particularity in avoiding, as far as possible, the exposure of infants and disabled passengers to danger from which it is not to be supposed they would have the discretion or the ability to escape, would apply. And if the passenger be deaf, and the employees in charge of the train have notice of his condition, greater care and attention would be due him, than to those without such an infirmity, to see that he is informed of the arrival of the train at his destination.³² But if the carrier have no notice of the passenger's disability, there can be no reason for demanding that his vigilance in behalf of the passenger should be increased.³³

Sec. 994. Duty toward intoxicated passengers.—While the carrier is not required to place a guard over a passenger who is intoxicated in order to prevent him from injuring himself, or from placing himself in a position of danger, if he have knowledge that the passenger is so intoxicated as to be incapable of protecting himself from danger, it would become his duty to exercise such special care and attention, beyond that owed to the ordinary passenger, as would be reasonably necessary, in view of the passenger's conduct or disposition of mind to encounter danger, to protect him from injury; and for a failure to do so, resulting in injury to him, the carrier would be liable.³⁴ Where the brakeman on a passenger train had notice that a badly intoxicated passenger had staggered from the car in which he was riding, and had assumed a posi-

32. *Railroad Co. v. Terry*, 27 Ill. Civ. App. 341, 65 S. W. Rep. 697. If the carrier accepts a

blind passenger, knowing his infirmity, it owes him the duty, commensurate with the care his condition requires, to protect him

from harm. *Illinois Central R. Co. v. Allen*, — Ky. —, 89 S. W. Rep. 150.

33. *Cleveland, etc., R. R. v. Terry*, 8 Ohio St. 570.

34. *Price v. The Railway*, — Ark. —, 88 S. W. Rep. 575;

tion upon the platform while the train was in motion, but made no effort to remove him to a place of safety, and he later fell from the platform and was injured, it was held that in failing to compel the passenger to occupy a place less exposed to danger, the carrier was guilty of negligence, and was therefore liable for the injury.³⁵ And even though the passenger be so intoxicated as to justify his ejection from the train, if he is put off at a place which is naturally dangerous to one in his condition, and in consequence is injured, the carrier will be liable for such injury.³⁶ But where the carrier has done his full duty in respect of the removal of a drunken passenger from the train, he will not be liable because the passenger afterwards wanders back upon the track and is struck and injured by a passing train.³⁷

Sec. 995. (§ 665.) Degree of care required in the carriage of children.—When the carrier accepts as a passenger a child of tender years, the test of negligence on the part of the carrier in his treatment of such a passenger will not be in all respects the same as when the passenger is one of mature years and understanding. Grown persons must be permitted to exercise their discretion, in a great measure, as to the positions they will occupy upon the carrier's conveyance, and to take upon themselves the risk of many dangers by their

Railroad Co. v. Carr, 47 Ill. App. 353. See also, *Strand v. The Railway*, 67 Mich. 380.

35. *Fox v. The Railroad*, — Mich. —, 101 N. W. Rep. 624, 68 L. R. A. 336.

36. *Atchison, etc., R. Co. v. Weber*, 33 Kan. 543; *Louisville, etc., R. Co. v. Sullivan*, 81 Ky. 624; *Railroad Co. v. Ellis' Adm'r*, 97 Ky. 330, 30 S. W. Rep. 979; *Johnson v. The Railroad*, 104 Ala. 241, 16 So. Rep. 75, 53 Am. St. Rep. 39; *Railroad Co. v. Johnson*, 108 Ala. 62, 19 So. Rep. 51, 31 L. R. A. 372; *Burke v. The Railroad*, 108 Ill. App. 565.

37. *McClelland v. The Railway*, 94 Ind. 276; *Louisville, etc., R. Co. v. Hawkins*, 92 Ala. 241, 9 So. Rep. 271; *Nash v. The Railway*, 136 Ala. 177, 33 So. Rep. 932, 96 Am. St. Rep. 19; *Gaukler v. The Railway*, 130 Mich. 666, 90 N. W. Rep. 660; *Louisville, etc., R. Co. v. Logan*, 88 Ky. 232, 10 S. W. Rep. 655, 21 Am. St. Rep. 332; *Brown's Adm'r v. The Railroad*, 19 Ky. Law Rep. 1873, 44 S. W. Rep. 648; *Railway Co. v. Valleley*, 32 Ohio St. 345; *Missouri, etc., Ry. Co. v. Evans*, 71 Tex. 361; *Hamilton v. Railroad Co.*, 183 Penn. St. 638, 38 Atl. Rep. 1085.

negligent conduct, if they choose so to do, with full knowledge of the probable consequences, and no obligation rests upon the carrier to remonstrate or to forbid it.³⁸ But in the case of a child who is being carried as a passenger, it would be incumbent upon the carrier, when the circumstances required it, to warn him against conduct upon his conveyance which exposed him to danger, and if he knowingly permitted him to occupy positions of danger upon it, he would be justly chargeable with negligence. And the same circumstances of negligence in taking on or putting off such a passenger, which might be scarcely blamable in the case of a grown person, might be reckless conduct if he were dealing with a child.³⁹

Sec. 996. Duty to furnish assistance to passengers who have fallen from train.—The question has arisen as to the duty of the carrier to furnish assistance to a passenger who, through no fault of the carrier, has stepped or fallen from the train while in motion, and has thereby received an injury rendering him unable to properly care for himself. The rule seems to be that if the carrier's servants in charge of the train have knowledge that the passenger has been rendered helpless by a fall from the train, it is their duty, as representing the carrier, to stop the train and furnish him with assistance if such can be done without endangering the safety of the other passengers committed to its care; but that, if the train cannot be stopped a sufficient time to render such

38. See *Aufdenberg v. The Railroad*, 132 Mo. 565, 34 S. W. Rep. 485, citing *Hutchinson on Carr.* road, 107 Mass. 108; *Maier v. The Railroad*, 67 N. Y. 52.

39. *Hemmingway v. Railroad Co.*, 72 Wis. 42; *Ridenhour v. Railway Co.*, 102 Mo. 270, 14 S. W. Rep. 760; *Metropolitan Ry. Co. v. Moore*, 83 Ga. 453; *Crissey v. The Railway*, 75 Penn. St. 83; *Philadelphia, etc., Ry. v. Hassard*, *id.* 367; *East Saginaw Ry. v. Bohn*, 27 Mich. 503; *Wilton v. The Rail-* But where the conductor has promised that he will see that an eight-year-old female passenger will be put off at her destination, he is under no duty to see that she does not leave her seat during the journey and disembark from the train. *Railroad Co. v. Jordan*, 23 Ky. Law Rep. 1730, 66 S. W. Rep. 27.

assistance, without endangering the safety of other passengers by collision or otherwise, no obligation will rest on the carrier to do so.⁴⁰ And though the passenger, by reason of his own imprudent conduct, is caused to fall from the train upon the carrier's track, where he is exposed in a helpless condition to danger of injury from other trains, it will nevertheless be the duty of the servants in charge of the train, if they have such notice of his condition as a person of ordinary prudence would believe and act upon, to stop the train and remove him from the track, or, if that cannot be done without danger to the passengers or employees on the train, to notify those in charge of the train from which he is in danger, or to adopt some other reasonable precaution to avoid injuring him.⁴¹ But where the passenger, because of drunkenness, was ejected from the train, and, in attempting to again board it while it was in motion, he fell in such a manner that his arm was crushed beneath the wheels, the brakeman on the train being informed of the accident but refusing to stop and render him assistance, it was held that the hazard of the business in which the carrier was engaged prevented it from playing the part of the Good Samaritan to one with whom it had no contract relation, and that no legal obligation rested on it to stop the train for the purpose of ascertaining if he was injured.⁴²

10. *Who are passengers.*

Sec. 997. (§ 554.) Who entitled to be considered a passenger.—It would be impossible to frame a clear, precise legal definition of the word "passenger" which would embrace all its essential elements. The one usually accepted by the courts, when a definition has been attempted, is that a passenger is

40. *Reed v. The Railroad*, 104 16 L. R. A. 674. See also, *Cincinnati*, 603, 47 S. W. Rep. 591, 44 *cinnati*, etc., *R. Co. v. Cooper*, 120 L. R. A. 823; *rehearing denied*, 48 Ind. 469.
S. W. Rep. 416.

41. *Railroad Co. v. Kassen*, 49 112 Ky. 915, 66 S. W. Rep. 1051, Ohio St. 230, 31 N. E. Rep. 282, 56 L. R. A. 580.

42. *Railway Co. v. Saulsberry*,

“one who travels in some public conveyance by virtue of a contract, express or implied with the carrier, as the payment of fare or that which is accepted as equivalent therefor.”⁴³ This definition, however, like all others, is hardly comprehensive enough, for, as a general rule, every person, not an employe, being carried with the express or implied consent of the carrier upon a public conveyance usually employed in the carriage of passengers is presumed to be lawfully upon it as a passenger.⁴⁴

There are two main elements in the legal definition of a passenger: first, an undertaking on the part of the person to travel in the conveyance provided by the carrier; and second, an acceptance by the carrier of the person as a passenger.⁴⁵ Whether either or both of these elements exist is ordinarily a question for the jury.

43. *Pennsylvania R. Co. v. Price*, 96 Pa. St. 256; *Bricker v. Railroad Co.*, 132 Pa. St. 1, 18 Atl. Rep. 983; *De La Vergne, etc., Co. v. McLeroth*, 60 Ill. App. 529; *Fitzgibbon v. Railway Co.*, 108 Iowa, 614, 79 N. W. Rep. 477; *s. c.* 119 Iowa, 261, 93 N. W. Rep. 276; *Rawlings v. Railroad Co.*, 97 Mo. App. 511, 71 S. W. Rep. 534; *Simmons v. Railroad Co.*, 41 Ore. 151, 69 Pac. Rep. 440, 1022.

“A passenger is one who enters the vehicle of a carrier with the intention of paying in money the usual fare, or who is supplied with a ticket or pass entitling him to ride to a given point.” *Holt v. Railroad Co.*, 87 Mo. App. 203.

A person who solicits the services of a licensed hackman is a passenger within an ordinance providing that it shall be unlawful for the driver to refuse to convey a passenger from one point to any other point in the city. *Atlantic City v. Brown*, 71 N. J. Law 81, 58 Atl. Rep. 110.

44. *Penn. R. R. v. Brooks*, 27 Pa. St. 339; *Moore v. Railway Co.*, 67 Ark. 389, 55 S. W. Rep. 161, citing *Hutch. on Carr.*; *Fitzgibbon v. Railway Co.*, 108 Iowa, 614, 79 N. W. Rep. 477; *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460, 58 S. W. Rep. 861, 51 L. R. A. 886; *Anderson v. Railway Co.*, — Mo. —, 93 S. W. Rep. 394.

But the presumption only extends to public vehicles, and there is no good reason for extending it so as to include a person riding upon a private vehicle, such as a brewer's wagon. *Lydon v. Robert Smith Ale Brewing Co.*, 132 Fed. 593, 67 C. C. A. 421.

Persons who borrow an engine and car for their own use from the officials of a railroad and are hurt by the negligent management of it are not passengers of the company. *Davis v. Railroad Co.*, 45 Fed. Rep. 543.

45. *Berry v. Railway Co.*, 124 Mo. 223, 25 S. W. Rep. 229.

The acceptance by the carrier need not be direct or express, but may be and usually is implied from the surrounding circumstances. Thus, in the case of railroad companies, if a train upon which a person takes passage is a regular passenger train or a train carrying passengers in general, and he boards such train without notice but that it is for passengers generally when in fact it is reserved for particular persons, the presumption will arise that he is a passenger. It is true that railroad companies have the right to run trains which do not carry passengers, or to run trains for particular persons, or for a particular class of persons and if one boards such a train, with notice of its character, he is not presumptively a passenger and there is no implied acceptance of him as a passenger in such a case. But if the train be fitted for the carriage of passengers, and is placed in such a position that persons may be induced to enter it as passengers, then it must be shown that such persons had notice or knowledge that it was not intended for their use.⁴⁶

Sec. 998. Same subject—Authority of carrier's employes to create relation of passenger.—Whatever, therefore, the rule may be when one is riding for his own convenience on a freight train, an engine, a hand-car, or any other carriage of the carrier that is evidently not designed for the transportation of passengers, the presumption is that one riding on a passenger coach, an omnibus, or any other carriage of the carrier that is palpably designed for the transportation of passengers, is lawfully there, by invitation of the employes of the carrier in charge of the vehicle, and that these employes have authority to bind the carrier by such invitation or permission. The presumption is not conclusive. Proper evidence or countervailing circumstances may rebut it. But, in the absence of these, it should have proper consideration. And this presumption should not be overlooked even where the person

46. *Fitzgibbon v. Railway Co.*, s. c. 119 Iowa, 261, 93 N. W. Rep. 108 Iowa, 614, 79 N. W. Rep. 477; 276.

is an employe of a railroad company riding with other employes in a passenger coach at the invitation of a yardmaster.⁴⁷

Sec. 999. Same subject—Persons not passengers who voluntarily ride in places not intended for passengers.—Persons intending to become passengers, however, are presumed to know that they must enter the coaches set apart for passengers, and the carrier is not required to notify every individual who may board its train of that fact. It is the duty of the latter, upon entering the train, to inquire where the coach is in which he may be carried to a certain point, and it then becomes the duty of the carrier's servants to inform him. If he acts upon the information, the company thereby accepts him as a passenger, and he is entitled thereafter to all the privileges and immunities as such. But if, upon the other hand, he fails to make such inquiry, and, in violation of the carrier's rules, enters a vehicle not set apart for passengers, he becomes a trespasser. This would be true where the entry is upon a baggage, mail or express car, or upon any other portion of the train not assigned to passengers.⁴⁸

Sec. 1000. Same subject—Riding on freight trains, engines, hand-cars, etc.—So if a person, by his own solicitation or by his own consent, is carried upon a vehicle or conveyance

47. *Bryant v. Railway Co.*, 53 Fed. 997, 4 C. C. A. 146, 12 U. S. App. 115.

Where one goes in good faith upon a special excursion train, believing that the conductor knew he was not a member of the excursion and that the conductor had the right to accept him as a passenger, and by the conductor's conduct he is accepted as a passenger, the relation of passenger arises even though the train was intended for excursionists only. *Fitzgibbon v. Railway Co.*, 119 Iowa, 261, 93 N. W. Rep. 276; *s. c.* 108 Iowa, 614, 79 N. W. Rep. 477.

An engineer of a passenger train ordinarily has no right, by his invitation to persons to board the train, to create passengership relations. *Railway Co. v. Allender*, 59 Ill. App. 620; *s. c.* 47 Ill. App. 484.

48. *Railroad Co. v. Field*, 7 Ind. App. 172, 34 N. E. Rep. 406, 52 Am. St. Rep. 444; *McGraw v. Railway Co.*, 135 N. Car. 264, 47 S. E. Rep. 758; *Sutherland v. Railway Co.* (Tex. Civ. App.), 40 S. W. Rep. 193; *Railway Co. v. Williams*, 91 Tex. 255, 42 S. W. Rep. 855, *reversing* (Tex. Civ. App.) 40 S. W. Rep. 350.

which is not used for the purpose of passenger carriage, and this being known to him, there can be no presumption that he is a passenger, although the owner may be a public carrier of passengers by other and different means of conveyance.¹ Hence, it has been said that one riding upon the freight train of a railroad company, the very appearance of which would indicate even to the most inexperienced, that it was not used by the company for the carriage of passengers, will not be presumed to be upon it to be carried as a passenger.² Nor would one who rode upon the locomotive of a train, though by the invitation of the conductor,³ or upon the engine cab with the consent of the brakeman or engineer,⁴ or upon a freight train by the invitation of the fireman,⁵ or upon a hand-car at the invitation of the section foreman,⁶ or upon a stone,⁷ work,⁸ or construction train,⁹ or upon the baggage wagon of an omnibus or transfer company which carries its passengers in its omnibuses and their baggage in its wagons, be regarded, *prima facie*, as a passenger of the company.¹⁰

Sec. 1001. (§ 555.) Same subject—Trespassers, tramps, defrauders, etc.—And if the person should be upon the conveyance by fraud, or against the express orders of the carrier,

1. This rule is held to apply even though such a person has money and has a *bona fide* intention to pay his fare. *Railway Co. v. Williams*, 91 Tex. 255, 42 S. W. 855, *reversing* (Tex. Civ. App.) 40 S. W. Rep. 350. 480; *affirmed*, 178 N. Y. 553, 70 N. E. Rep. 1109; *McGucken v. Railroad Co.*, 77 Hunn, 28 N. Y. Supp. 298.

2. *Ante*, § 964.

3. *Files v. Railroad Co.*, 149 Mass. 204; *Nightingale v. Union Colliery Co.*, 9 B. C. R. 453, 2 Can. Ry. Cases, 47.

4. *Stringer v. Railway Co.*, 96 Mo. 299; *Radley v. Railway Co.*, 44 Ore. 332, 75 Pac. Rep. 212; *Railroad Co. v. Bogle*, 101 Tenn. 40, 46 S. W. Rep. 760, citing *Hutch. on Carr.*; *Streets v. Railway Co.*, 78 N. Y. Supp. 729, 76 App. Div.

5. *Railroad Co. v. Thornton*, 22 Ky. L. R. 778, 58 S. W. Rep. 796.

6. *Rathbone v. Railroad Co.*, 40 Ore. 225, 66 Pac. Rep. 909; *Willis v. Railroad Co.*, 120 N. Car. 508, 26 S. E. Rep. 784.

7. *Menaugh v. Railway Co.*, 157 Ind. 20, 60 N. E. Rep. 694.

8. *Railway Co. v. Hanna* (Tex. Civ. App.), 58 S. W. Rep. 548.

9. *Burns v. Railway Co.*, 63 S. Car. 46, 40 S. E. Rep. 1018.

10. *Eaton v. The Railroad*, 57 N. Y. 382.

who had just cause for refusing to carry him, he would not be entitled to the rights of a passenger.¹¹ Thus the rule is well settled that where one gets on a passenger train with the deliberate purpose not to pay his fare, and adheres to that purpose, or if, being on the train, and having money with which he could pay his fare, he falsely and fraudulently represents to the conductor that he is without means to pay his fare, and by means of such false representations induces the conductor to permit him to remain on the train without paying his fare, the relation of carrier and passenger and the obligations resulting from that relation are not thereby established between him and the company, and the company owes him no other duty than not to wilfully or recklessly injure him.¹² To be entitled to the rights of a passenger, the plaintiff who sues for an injury occasioned by the negligence of the company must have been

11. *Austin v. The Railroad*, L. R. 2 Q. B. 442; *Lygo v. Newbold*, 9 Exch. 302; *Satterlee v. Groat*, 1 Wend. 272; *O'Brien v. The Railroad*, 15 Gray, 20; *Johnson v. Railway Co.*, 94 Fed. 473.

In *Odell v. Railroad Co.*, 45 N. Y. Supp. 464, 18 App. Div. 12; *affirmed*, 162 N. Y. 625, 57 N. E. Rep. 1119, the court held it to be a question for the jury to determine whether the plaintiff, in presenting a ticket which had been issued to a third person and which provided that any "visitor" to his family might ride upon it, acted in good faith, and in the honest belief that she was entitled to ride upon it as a "visitor."

On an issue whether a person was a trespasser or a passenger, if the plaintiff testifies that he was a passenger and that his ticket was taken up by a certain conductor, it is competent for the railroad company's auditor to testify to the system of issuing and sell-

ing tickets by consecutive numbers, of stamping upon them the date of sale and of the return and preservation of the tickets used and cancelled by conductors, and that the tickets returned as sold and dated on the day in question were not taken up by the conductor with whom the plaintiff claimed to have ridden, but by others. *Pfaffenback v. Railway Co.*, 142 Ind. 246, 41 N. E. Rep. 530.

An attempt at evasion of payment of fare will not deprive a person of the right to later go into the passenger car and pay his fare. *Fordyce v. Beecher*, 2 Tex. Civ. App. 29, 21 S. W. Rep. 179.

12. *Condran v. Railroad Co.*, 67 Fed. 522, 14 C. C. A. 506, 32 U. S. App. 182, 28 L. R. A. 749; *Toledo, etc., R. R. v. Brooks*, 81 Ill. 245, 292; see also, *Railroad Co. v. Smith*, 110 Tenn. 197, 75 S. W. Rep. 711, 100 Am. St. Rep. 799.

lawfully upon its train, and if the company is sued for the injury, it may defend upon the ground that the plaintiff had unlawfully induced the servants of the company to receive him upon its cars by the use of a ticket on which he had no right, according to the rules of the company, to travel upon its railway.¹³ So where the company had issued a free ticket or pass to a particular person, which, by its terms, was not transferable, if another person travel by the use of such pass upon the road of the company, without its knowledge or express authority, and, being injured, sue the company, he can recover for the injury only upon showing that it was occasioned by the gross negligence of its servants or agents.¹⁴ So a person who boards a train without invitation, right or payment of fare,¹⁵ a child entering a car to play,¹⁶ a person who steals a ride upon the engine,¹⁷ a person who rides in a mail car with-

13. *Great Northern, etc., Railway v. Harrison*, 10 Exch. 376, 26 Eng. L. & Eq. 443. Thus in *McVeety v. Railway Co.*, 45 Minn. 268, 47 N. W. Rep. 809, it is said: "It is probable that there is authority for the statement that when the conductor of a train disobeys the rules of the company for which he is acting, in regard to the collection of fare from a traveler, or in respect to some other matters, such, for instance, as permitting him upon a forbidden part of the train or upon a train not allowed to carry passengers, the traveler has all the rights of a passenger, if he has no notice of the rule, express or implied, or of the conductor's disobedience. But if a person solicits and secures free transportation, or if he rides upon a part of the train from which passengers are excluded, or takes passage upon a train not allowed to carry passengers, knowing that his act is against

the rules of the carrier, and in permitting it the conductor is disobedient, he is guilty of a fraud, and not entitled to a passenger's rights. *Railway Co. v. Brooks*, 81 Ill. 245; *Same v. Beggs*, 85 Ill. 80; *Robertson v. Railway Co.*, 22 Barb. 91; *Railway Co. v. Nichols*, 8 Kan. 505; *Prince v. Railway Co.*, 64 Tex. 146; *Railway Co. v. Campbell*, 76 Tex. 174, 13 S. W. Rep. 19."

14. *Toledo, etc., Ry. Co. v. Beggs*, 85 Ill. 80; *Way v. Railway Co.*, 64 Iowa, 48.

15. *Gardner v. New Haven, etc., Co.*, 51 Conn. 143. As a boy stealing a ride. *Hendryx v. Railroad Co.*, 45 Kans. 377, 25 Pac. Rep. 893; see also, *Planz v. Railroad Co.*, 157 Mass. 377, 32 N. E. Rep. 356, 17 L. R. A. 835.

16. *Reary v. Railway Co.*, 40 La. Ann. 32.

17. *Chicago, etc., R. Co. v. Michie*, 83 Ill. 427.

out right and unknown to the company's servants,¹⁸ a person who clandestinely rides upon the steps of a car,¹⁹ or climbs into the caboose,²⁰ without having a ticket or paying fare, a person who is attempting to "dead head" or "beat" his way,²¹ is not a passenger or entitled to protection as such.

A person is also not a passenger who is informed by the conductor of a freight train that he is forbidden by the rules of the company to ride thereon, although the conductor permits him to ride and though he pays the regular fare.²² Nor is one a passenger who enters the train of a railroad company through a fraudulent or collusive arrangement with the conductor, brakeman, or other subordinate employe,²³ and the fact that he has paid a sum of money to the brakeman does not better his position.²⁴

Sec. 1002. (§ 555a.) Same subject—Passenger by mistake on wrong train is not a trespasser.—But a person who is desirous of becoming a passenger and has purchased his ticket or is ready to pay fare, but who by mistake gets upon the wrong train, is not a trespasser, but a passenger, and is entitled to protection as such.²⁵ And where his getting upon the

18. *Bricker v. Railroad Co.*, 132 Pa. St. 1; *Farley v. Railroad Co.*, 108 Fed. 14, 47 C. C. A. 156.

19. *Chicago, etc., R. Co. v. Mehlsack*, 131 Ill. 61, 22 N. E. Rep. 812.

20. *Haase v. Railway Co.*, 19 Ore. 354, 24 Pac. Rep. 238.

21. *Higley v. Gilmer*, 3 Mont. 90; *Pledger v. Railroad Co.*, — Neb. —, 95 N. W. Rep. 1057.

22. *Railroad Co. v. Hailey*, 94 Tenn. 383, 29 S. W. Rep. 367, 27 L. R. A. 549.

23. *Purple v. Railroad Co.*, 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700; *Railroad Co. v. Mitchell*, 32 Fla. 77, 13 So. Rep. 673, 21 L. R. A. 487; *Sands v. Railway Co.*, 108 Tenn. 1, 64 S. W. Rep. 478.

24. *McNamara v. Railway Co.*, 61 Minn. 296, 63 N. W. Rep. 726; *Railway Co. v. Huff*, 98 Tex. 110, 81 S. W. Rep. 525, reversing (Tex. Civ. App.), 78 S. W. Rep. 249; *Janny v. Railway Co.*, 63 Minn. 380, 65 N. W. Rep. 450; *Brevig v. Railway Co.*, 64 Minn. 168, 66 N. W. Rep. 401, 404; *Mendenhall v. Railway Co.*, 66 Kan. 438, 71 Pac. Rep. 846, 61 L. R. A. 120, 97 Am. St. Rep. 380.

25. *Railway Co. v. Rosenzweig*, 113 Pa. St. 519; *Patry v. Railway Co.*, 77 Wis. 218, 46 N. W. Rep. 56; s. c. 82 Wis. 408, 52 N. W. Rep. 312; *Railway Co. v. Pruitt* (Tex. Civ. App.), 79 S. W. Rep. 598; s. c., writ of error denied, 97 Tex. 487, 80 S. W. Rep. 72; *Gary v. Railway Co.*, 17 Tex. Civ. App.

wrong train is owing to the fault of the company's agents, as where he shows his ticket to the brakeman before entering and is told that he is at the right train, he should be carried to and put off at a place reasonably safe and convenient from which to get upon the proper train.²⁶ So a person who gets upon the train supposing, in good faith, that he has a proper ticket, is not a trespasser.²⁷

Sec. 1003. (§ 555b.) Same subject—Person riding on "drover's pass."—In the transportation of live animals, it is usually provided by the contract that the shipper, or some one on his behalf, shall go with them on the journey to attend to their wants and protect them from injury, and that, for this purpose, such person shall be furnished with free transportation on the train with the animals to their destination and with return carriage to the starting point, usually upon a passenger train. Such carriage is not gratuitous,²⁸ and the person so

129, 42 S. W. Rep. 576; *Railroad Co. v. Morris*, 17 Ind. App. 189, 46 N. E. Rep. 554, 60 Am. St. Rep. 166.

26. *Patry v. Railway Co.*, *supra*; *Baldwin v. Railway Co.*, 128 Mich. 417, 87 N. W. Rep. 380; *Railway Co. v. Pruitt* (Tex. Civ. App.), 79 S. W. Rep. 598, writ of error denied, although decision criticized, in 97 Tex. 487, 80 S. W. Rep. 72.]

But when a passenger voluntarily leaves the train at some other point than a station, and passes along the railway track in order to get to the right train, and by so doing falls into a cattle guard and is injured, the railway company is not liable for the injury since, when he leaves the train of his own accord, he ceases to be a passenger and the company is not bound to protect him as such. *Finnegan v. Railway Co.*, 48 Minn. 378, 51 N. W. Rep. 122, 15 L. R. A. 399.

27. *Ham v. Canal Co.*, 142 Pa. St. 617, 21 Atl. Rep. 1012.

28. *Pennsylvania R. Co. v. Henderson*, 51 Penn. St. 315; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1; *Hammond v. Railroad Co.*, 6 S. C. 130; *Ohio, etc., R. Co. v. Nickless*, 71 Ind. 271; *Missouri, etc., Ry. Co. v. Ivy*, 71 Tex. 409; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471; *Little Rock, etc., Ry. Co. v. Miles*, 40 Ark. 298; *Maslin v. Railroad Co.*, 14 W. Va. 180; *Railroad Co. v. Bell*, 100 Ky. 203, 38 S. W. Rep. 3; *Saunders v. Southern Pac. Co.*, 13 Utah, 275, 44 Pac. Rep. 932, citing *Hutch. on Carr.*

An employe accompanying live stock whose transportation is furnished by the railroad company without extra charge under its contract to transport the stock is a passenger within the meaning of the Pennsylvania statute (Act,

carried is entitled to protection as a passenger both while going and returning;²⁹ and this rule is not altered by a recital

April 4, 1868, P. L. 58), which relieves a railroad company from liability for injuries received by any person not a passenger. *Rowdin v. Railroad Co.*, 208 Pa. St. 623, 57 Atl. Rep. 1125.

But see *Bicknell v. Railroad Co.* (Can.), 26 Ont. App. 431.

29. *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162; *Little Rock, etc., Ry. Co. v. Miles*, 40 Ark. 298; *Graham v. Railroad Co.*, 66 Mo. 536; *Lawson v. Railway Co.*, 64 Wis. 447; *Missouri, etc., Ry. Co. v. Ivy*, 71 Tex. 409; *Porter v. Railroad Co.*, 13 N. Y. Suppl. 591; *Railway Co. v. White*, 101 Fed. 928, 42 C. C. A. 86; *s. c.* (C. C. A.), 108 Fed. 990; *Railroad Co. v. Nichols*, 85 Fed. 945, 29 C. C. A. 500; *Railroad Co. v. Beebe*, 174 Ill. 13, 50 N. E. Rep. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210, *affirming* 69 Ill. App. 363; *Railroad Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. Rep. 809, *affirming* 57 Ill. App. 538; *Railroad Co. v. Gresco*, 102 Ill. App. 252; *s. c.* 79 Ill. App. 127; *Railway Co. v. Teeters*, — Ind. App. —, 74 N. E. Rep. 1014; *s. c.* 77 N. E. Rep. 599; *Weaver v. Railroad Co.*, — Mich. —, 102 N. W. Rep. 1037; *Pitcher v. Railway Co.*, 61 Hun, 623, 16 N. Y. Suppl. 62; *s. c.* 8 N. Y. Suppl. 389; *American Express Co. v. Ogles* (Tex. Civ. App.), 81 S. W. Rep. 1023; *Railway Co. v. Armstrong*, 4 Tex. Civ. App. 146, 23 S. W. Rep. 236; *Sprigg's Adm'r v. Railroad Co.*, — Vt. —, 60 Atl. Rep. 143; *Feldschneider v. Railway Co.*, 122 Wis. 423, 99 N. W. Rep. 1034; *Abrams v. Railway Co.*, 87 Wis.

485, 58 N. W. Rep. 780, 41 Am. St. Rep. 55; *Davis v. Railway Co.*, 93 Wis. 470, 67 N. W. Rep. 16, 57 Am. St. Rep. 935, 33 L. R. A. 654; *Solan v. Railway Co.*, 95 Iowa, 260, 63 N. W. Rep. 692, 58 Am. St. Rep. 430, 28 L. R. A. 718; *Railway Co. v. Martin*, 59 Kan. 437, 53 Pac. Rep. 461; *Railway Co. v. Posten*, 59 Kan. 449, 53 Pac. 465; *Railroad Co. v. Bell*, 100 Ky. 203, 38 S. W. Rep. 3; *Rowdin v. Railroad Co.*, 208 Pa. St. 623, 57 Atl. Rep. 1125; *Saunders v. Southern Pac. Co.*, 13 Utah, 275, 44 Pac. Rep. 932; *Southern Ry. Co. v. Cullen*, — Ill. —, 77 N. E. Rep. 470; *South-ern Ry. Co. v. Roach*, — Ind. App. —, 77 N. E. Rep. 606; *s. c.* 78 S. E. Rep. 201; *Evansville, etc., R. Co. v. Mills*, — Ind. App. —, 77 N. E. Rep. 608.

For the rule in South Dakota, see *Meuer v. Railway Co.*, 5 S. Dak. 568, 25 L. R. A. 81, 59 N. W. Rep. 945, 49 Am. St. Rep. 898; *s. c.* 11 S. Dak. 94, 75 N. W. Rep. 823, 74 Am. St. Rep. 774.

An attempt to limit the authority of the railroad's agent by requiring that he shall impose a limitation of liability for personal injuries in every such contract for the shipment of live stock is void. Moreover, even if a case were made showing that an agent had such a limited authority, it would not affect a person dealing with him as a representative of the company, without notice of such a limitation. *Railroad Co. v. McLaughlin*, 73 Fed. 519, 19 C. C. A. 551, 43 U. S. App. 181.

Where a carrier undertakes to

in the contract that he is to be deemed to be an employee of the carrier while so traveling.³⁰ He is only a passenger, however, in a restricted and modified sense, for he assumes such risks and inconveniences as necessarily attend upon caring for his stock and as are characteristic of the vehicle upon which he is carried. To the extent that such risks and inconveniences interfere with the operation of ordinary rules of liability, the duty of the carrier is accordingly modified.³¹ But subject to

transport live stock over its own and connecting lines, and by the terms of the contract its liability for damage to the stock is limited to its own line, and the shipper as incident to such contract is provided with a drover's pass entitling him to be carried to and from the point of destination of the stock, the liability of the contracting carrier for injuries to the shipper while traveling as a passenger is not, in the absence of an express limitation to that effect, limited to its own line. *Railway Co. v. Cole*, 8 Tex. Civ. App. 635, 28 S. W. Rep. 391.

Nor does the fact that a person in charge of stock or live animals knows that his employer has made arrangements with the railroad company charge him with knowledge that the contract between his employer and the railroad company exempted the latter from liability for any injuries received by him while traveling in the stock car. *Coppock v. Railroad Co.*, 89 Hun, 186, 34 N. Y. Supp. 1039.

One who is carried upon a boat upon which his live stock is being carried, for the purpose of caring for the same, is a passenger and such relation does not cease while he is on his way to

and from the place where his live stock is confined. Thus, where such a person fell through an open hatchway while on his way to care for the stock, the carrier's negligence in not properly lighting the way made it liable in damages. *Memphis & C. Packet Co. v. Buckner*, 22 Ky. L. R. 401, 57 S. W. Rep. 482.

30. *Missouri, etc., R'y Co., v. Ivy*, 71 Tex. 409; *Railway Co. v. Nelson*, (Tex. Civ. App.) 44 S. W. Rep. 179.

One, by accepting a drover's pass, does not become the servant of the railroad company, and is not within the fellow servant rule. *Railroad Co. v. Crow*, 54 Neb. 747, 74 N. W. Rep. 1066, 69 Am. St. Rep. 741.

31. *Railroad Co. v. Troyer*, — Neb. —, 103 N. W. Rep. 680; *Railway Co. v. Crow*, 47 Neb. 84, 66 N. W. Rep. 21; *Railway Co. v. Tietken*, 49 Neb. 130, 68 N. W. Rep. 336, 59 Am. St. Rep. 526; *Railroad Co. v. State*, 95 Md. 637, 53 Atl. Rep. 969.

A shipper of live-stock over a road consisting of different lines of carriers, who has been furnished with free transportation for the purpose of caring for such stock, must take notice of the delays incident to transfers at the

such modification, the carrier is still bound to exercise the highest degree of care of which human foresight is capable.³²

Sec. 1004. Same subject—Person riding on “employee’s pass.”—There are many authorities holding that an employee of a carrier of passengers, traveling free as a part of his contract of service to and from his work, is not a passenger but an employee and a fellow servant with those in charge of the carrier’s vehicle.³³ But where an employee is traveling on his own private business, when his time is his own, even though he travels on a pass or ticket received on account of his employment but at which time he is not on his way to or from such employment, or where he is permitted to travel without a pass or ticket by reason of his employment, as where there is a rule

junctions of the roads, which delays are indicated upon the scheduled time tables of the railroad company, and such delays can form no ground for a charge of negligence. *Burns v. Railway Co.*, 104 Wis. 646, 80 N. W. Rep. 927.

32. *Railroad Co. v. Crow*, 54 Neb. 747, 74 N. W. Rep. 1066, 69 Am. St. Rep. 741; *Lake Shore, etc. R’y Co. v. Teeters*, — Ind. —, 77 N. E. Rep. 599.

Where a trainman in authority tells a shipper of live stock, who is traveling with the stock for the purpose of rendering it care, that the train will remain standing for some time at a certain point, and directs him to look after the stock at such time, he may rely on it that the train will not be moved without notice to him, as it is customary for shippers to assume dangerous positions when caring for the stock. *Railway Co. v. Jahn*, 18 Tex. Civ. App. 74, 43 S. W. Rep. 575.

When a shipper of live stock is directed to pass over a certain

path by the carrier’s servants, in order to reach a connecting train, it is the duty of the carrier to see that the pathway is safe and not made dangerous by the operation of its trains and engines while the shipper is upon it. *Railroad Co. v. Troyer*, — Neb. —, 97 N. W. Rep. 308.

33. *Gillshannon v. Railroad Co.*, 10 Cush. 228; *Seaver v. Railroad Co.*, 14 Gray, 466; *Gilman v. Railroad Co.*, 10 Allen, 233, 87 Am. Dec. 635; *Higgins v. Railroad Co.*, 36 Mo. 418; *Vick v. Railroad Co.*, 95 N. Y. 267, 47 Am. Rep. 36; *Ryan v. Railroad Co.*, 23 Pa. 384; *McNulty v. Railroad Co.*, 182 Pa. 479, 38 Atl. Rep. 524, 38 L. R. A. 376, 61 Am. St. Rep. 721; *Wright v. Railroad Co.*, 122 N. Car. 852, 29 S. E. Rep. 100; *Ionnone v. Railroad Co.*, 21 R. I. 452, 44 Atl. Rep. 592; 46 L. R. A. 730; *Travelers Ins. Co. v. Austin*, 146 Ga. 266, 42 S. E. Rep. 522, 59 L. R. A. 107 (paymaster not a passenger).

that all employees may ride free while in uniform, whether they are going to or from their employment or not, he is a passenger and not a servant when riding upon the cars provided for the reception of passengers.³⁴

Sec. 1005. (§ 556.) Same subject—May become passenger before entering vehicle—Effect of signal to stop.—But a person may become a passenger, without having come into the carrier's vehicle, if the surrounding circumstances show an intent on his part to become a passenger and an acceptance of him by the carrier as a passenger.³⁵ Thus, in *Brien v. Bennett*³⁶ it appeared that the defendant's omnibus was passing

- 34.** *Whitney v. Railroad Co.*, 70 S. W. Rep. 331; *Williams v. Railroad Co.*, 18 Utah, 210, 54 Pac. Rep. 991, 72 Am. St. Rep. 777.
- 102 Fed. 850*, 43 C. C. A. 19, 50 L. R. A. 615; *Carswell v. Railroad Co.*, 118 Ga. 826, 45 S. E. Rep. 695; *Railroad Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336; *Railroad Co. v. Waggoner*, 90 Ill. App. 556; *Doyle v. Railroad Co.*, 166 Mass. 492, 44 N. E. Rep. 611; *s. c.* 162 Mass. 66, 37 N. E. Rep. 770, 25 L. R. A. 157, 55 Am. St. Rep. 417; *Railroad Co. v. Scott's Adm'r*, 22 Ky. L. R. 30, 56 S. W. Rep. 674, 50 L. R. A. 381, 108 Ky. 392; *State v. Railroad Co.*, 63 Md. 433; *Rosenbaum v. Railroad Co.*, 38 Minn. 173, 36 N. W. Rep. 447, 8 Am. St. Rep. 653; *McNulty v. Railroad Co.*, 182 Pa. St. 479, 38 Atl. Rep. 524, 38 L. R. A. 376, 61 Am. St. Rep. 721; *O'Donnell v. Railroad Co.*, 59 Pa., 239, 98 Am. Dec. 336; *Washburn v. Railroad Co.*, 3 Head, (Tenn.) 638, 75 Am. Dec. 784; *Chattanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460, 58 S. W. Rep. 861, 51 L. R. A. 886; *Railroad Co. v. Burns*, 51 N. J. Law, 340, 17 Atl. Rep. 630; *Simmons v. Railroad Co.*, 41 Ore. 151, 69 Pac. Rep. 440, 1022; *Railway Co. v. Flood*, 5 Tex. Ct. Rep. 922,
- 35.** *Railroad Co. v. Voils*, 98 Ga. 446, 26 S. E. Rep. 483, 35 L. R. A. 655, citing *Hutch. on Carr.*; *Rogers v. Steamboat Co.*, 86 Me. 261, 29 Atl. Rep. 1069, 25 L. R. A. 491; *Murphy v. Railroad Co.*, 43 Mo. App. 342, citing *Hutch. on Carr.*; *Barth v. Railway Co.*, 142 Mo. 535, 44 S. W. Rep. 778; *Frobisher v. Transp. Co.*, 81 Hun, 544, 30 N. Y. Supp. 1099.
- In *Railroad Co. v. Voils*, *supra*, a person went to a flag station which was not a regular stopping place for trains but where trains stopped when signalled. The court held that if one has given the proper signal, and the train is stopped for the purpose of taking him aboard, he is, when attempting to board the train, a passenger and entitled to all the rights due a passenger even though he has purchased no ticket. And if he is injured by the negligence of the carrier's servants while boarding the train, the carrier is liable.
- 36.** 8 C. & P. 724.

on its journey when the plaintiff held up his finger to cause the driver to stop and take him up, and that upon his doing so, the driver pulled up and the conductor opened the omnibus door; and that just as the plaintiff was putting his foot on the step of the omnibus, the driver, supposing that he had got into the omnibus, drove on, and the plaintiff was much hurt by falling on his face. Upon this state of facts, it was contended by the defendant that the plaintiff had never become a passenger. But it was answered by the court, that the stopping of the omnibus implied a consent to take the plaintiff as a passenger; and, upon this evidence, the case was submitted to the jury, who found a verdict for the plaintiff.

On the other hand, if the circumstances do not show an express or implied invitation of the carrier to a person to become a passenger, the carrier cannot be held liable if he is injured while attempting to board the carrier's vehicle.³⁷

Sec. 1006. Same subject—Person waiting to take train entitled to protection—Person pursuing departing train—Spectators.—The general rule is that where a person, with the *bona fide* intention of taking passage upon a train, goes to the station within a reasonable time prior to the hour of departure of the train, and there, either by the purchase of a ticket or in some other manner, indicates to the carrier his intention to take passage, from that time on, while waiting for the train, he is entitled to all the rights and privileges of a passenger.³⁸

³⁷. *Railway Co. v. Robinson*, 68 Miss. 643, 10 So. Rep. 60; *Creech v. Railway Co.*, 66 S. C. 528, 45 S. E. Rep. 86.

Merely going on board to inspect a vessel, or to select and reserve a berth, is not any part of a journey, nor the beginning of the relation of carrier and passenger. *The Bella*, 91 Fed. 540; *The Eugene*, 87 Fed. 1001, 31 C. A. 345, *affirming* 83 Fed. 222.

³⁸. *Exton v. Railroad Co.*, 62 N. J. Law 7, 42 Atl. Rep. 486, 56 L.

R. A. 508; *s. c. affirmed in* 63 N. J. Law 356, 46 Atl. Rep. 1099; *Chicago, etc. R. Co. v. Young*, 118 Ill. App. 226; *MacFeat v. Railroad Co.*, — Del. —, 62 Atl. Rep. 898. See, also, *Railroad Co. v. Hagblad*, — Neb. —, 101 N. W. 1033; *s. c.* 106 N. W. Rep. 1041.

Where the person who held a round trip ticket came to the depot with the return coupon for the purpose of making the return trip, it was held that such

So where a person, having gone to the depot or station where passengers were received upon the trains of a railway company, had there purchased her ticket at the office provided for the purpose, it was held that in passing from the office to the train, under the direction of the station agent, over premises belonging to the company and connected with the road as a part of its station grounds, she was to be considered as a passenger, and that the company was bound to use the utmost care in providing for her a safe passage and in preventing injury to her from its passing trains.³⁹ But though a person who has gone to the station and purchased a ticket and is waiting to take the train may be entitled to protection as a passenger, yet if he wilfully waits until the train has started and then runs after it to overtake it, he cannot while so pursuing the train be deemed to be a passenger or entitled to protection as such.⁴⁰ So where one going to take a train arrives at the station after the last train has gone, and remains thereafter for his own convenience, during which time the station-master puts out the lights at the usual time for closing, he is thereafter a mere licensee and not a passenger, and cannot recover for injuries sustained in leaving the station caused by the extinguishment of the lights.⁴¹ So, obviously, a person is not a passenger who is merely on his way to the station to take a train,⁴² unless he is being carried to the station in the

person was a passenger. *Chicago, etc. R. Co. v. Walker*, 217 Ill. 605, 75 N. E. Rep. 520. But to go to the station three hours before train time is unreasonable. *Railroad Co. v. Laloge*, 24 Ky. Law R. 693, 696, 69 S. W. Rep. 795, 62 L. R. A. 405.

39. *Warren v. The Railroad*, 8 Allen, 227, *Poucher v. The Railroad*, 49 N. Y. 263; *Young v. The Railroad*, 171 Mass. 33, 50 N. E. Rep. 455, 41 L. R. A. 193.

But see *Archer v. Railroad Co.*, 110 Mo. App. 349, 85 S. W. Rep. 934.

40. *Central R. Co. v. Perry*, 58 Ga. 461, *Perry v. Railroad Co.*, 66 Ga. 764; see also, *Spannagle v. Railroad Co.*, 31 Ill. App. 460.

41. *Heinlein v. Railroad Co.*, 147 Mass. 136.

42. *June v. Railroad Co.*, 153 Mass. 79, 26 N. E. Rep. 238; *Webster v. Railroad Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Railroad Co. v. Smith*, 86 Fed. 292, 30 C. C. A. 58, 40 L. R. A. 746; *Railroad Co. v. Jennings*, 190 Ill. 478, 60 N. E. Rep. 818, 54 L. R. A. 827, reversing 89 Ill. App. 335; *Railway Co. Weeks*, 99 Ill.

carrier's vehicle.⁴³ *A fortiori*, one who goes to a station merely as a spectator is not a passenger nor entitled to protection as such.⁴⁴

Sec. 1007. (§ 557a.) Same subject—May be passenger though received in vehicle before ready to start.—So where a railroad company, by the invitation of its agent, receives a person as a passenger in its car before the train is made up or is ready to start, it must protect such person as a passenger, and must couple, manage and control its cars and engines in such a manner as not through negligence to injure him.⁴⁵

Sec. 1008. (§ 558.) Same subject—Prepayment of fare not necessary.—And it has been held that, even without the payment of the fare or the purchase of a ticket, if the person desiring to be carried has gone to the station of the company, and has there announced her intention to go upon the train to the officers of the company, and is acting under the directions of such officers or agents in getting upon it, she will be regarded as standing to the company in the relation of a passenger, and it will be liable to her as such for any injury she may receive through the negligence of its agents whilst in the act of getting on board according to the directions given.⁴⁶

App. 518; *affirmed*, 198 Ill. 551, 64 N. E. Rep. 1039; *Tingley v. Railroad Co.*, 96 N. Y. Supp. 865, 109 App. Div. 793.

43. *Buffett v. The Railroad*, 40 N. Y. 168, 36 Barb. 420.

44. *Burbank v. Railroad Co.*, 42 La. Ann. 1156, 11 L. R. A. 720.

45. *Hannibal, etc. R. Co. v. Martin*, 111 Ill. 219.

46. *Railroad Co. v. Voils*, 98 Ga. 446, 26 S. E. Rep. 483, 35 L. R. A. 655; *Railroad Co. v. Laloge*, 24 Ky. L. Rep. 693, 696, 69 S. W. Rep. 795, 62 L. R. A. 405, citing *Hutch. on Carr.*; *Allender v. Railroad Co.*, 37 Iowa, 264; *Railroad Co. v. Groseclose*, 88 Va. 267, 13 S. E. Rep. 454, 29 Am. St. Rep. 718;

Railroad Co. v. State, 81 Md. 371, 32 Atl. Rep. 201; *Albin v. Railway Co.*, 103 Mo. App. 308, 77 S. W. Rep. 153; *Phillips v. Railway Co.*, 124 N. Car. 123, 32 S. E. Rep. 388, 45 L. R. A. 163.

Where a person enters a railroad ticket office and requests a ticket, at the same time laying his money for the same on the counter, but he is told by the agent to pay on the train, his relation to the company is that of a passenger. *Ramm v. Railroad Co.*, 94 Iowa, 296, 62 N. W. Rep. 751.

Evidence as to declarations made by a deceased person shortly before he was killed by the de-

Sec. 1009. (§ 559.) Same subject—Injury while waiting but before purchase of ticket.—So where the plaintiff was waiting at a station to take passage upon an expected train, and whilst so waiting, and before she had procured a ticket or paid her fare for the intended journey, she was injured in an endeavor to escape from what she reasonably supposed to be a dangerous position in which she was placed by the negligence of the agents of the company, it was held that the company had failed to exercise towards her the care and diligence which are required of the carrier of passengers, and that she was therefore entitled to a recovery against it.¹

Sec. 1010. (§ 560.) Same subject—Is a passenger while coming to station on carrier's vehicle.—Where the plaintiff was injured by the overturning of a stage sleigh, while on his way to the train, and before he had paid his fare or obtained his ticket, the railroad company was held liable to him as a passenger, it being shown that the sleigh belonged to a person with whom the company had a contract, for a daily compensation, to carry passengers from the village at which the plaintiff had got upon the sleigh to its station, and that the owner

defendant's train that he intended to go to a certain place on the defendant's line is admissible as tending to show his right to be upon the defendant's property *Railroad Co. v. State*, 81 Md. 371, 32 Atl. Rep. 201.

Where it appeared that plaintiff's intestate went to Boston daily, and that, less than a quarter of an hour before the accident, he had left his house in a hurry, saying that he was going to take the defendant's train as there were no electric cars running, and that, just after he had reached the platform of the car, he was killed in a collision with another train, it was held to be a question for the jury whether he

was a passenger, although there was no proof that he had a ticket or the money to pay for one. *Inness v. Railroad Co.*, 168 Mass. 433, 47 N. E. Rep. 193.

As to the admissibility of declarations of intention to become a passenger, see *Railway Co. v. Herrick*, 49 Ohio, St. 25, 29 N. E. Rep. 1052 and *Railroad Co. v. Chancellor*, 165 Ill. 438, 46 N. E. Rep. 269, reversing 60 Ill. App. 525.

1. *Caswell v. The Railroad*, 98 Mass. 194. See, also, *Gordon v. The Railroad*, 40 Barb. 546; *Central R. R. v. Perry*, 58 Ga. 461; *Grimes v. Penn. Co.*, 36 Fed. Rep. 72; *Railway Co. v. Wagley*, 91 Fed. 860, 34 C. C. A. 114.

and his sleigh were in the company's employment at the time of the accident, the sleigh under such circumstances being regarded as a part of the transporting arrangements of the company in connection with their railroad.²

Sec. 1011. (§ 561.) Same subject—Injury to passenger on platform by objects thrown from passing train—Coal—Stick of wood—Mail bags.—A person does not cease to be a passenger by being on the platform waiting for a train, and if he is injured by articles negligently thrown from the train by the carrier's own servants, or by postal clerks or express men in pursuance of a notorious practice which the company could take precautions against or prevent, the company will be liable in damages.³ Thus where a person was standing upon the station platform waiting for his train which was late and, while so waiting, a piece of coal from the tender of a passenger train going by the station struck him and caused him serious injury, the court held that he sustained the relation of passenger to the carrier since he was there for the purpose of taking the train and, the train being late, he had a right to wait for it.⁴ So where one traveling upon a railway train left the car upon which he was being carried, and, while standing upon a platform of the road, but not the one intended for the accommodation of its passengers, but very near the train, was injured by a stick of burning wood carelessly thrown from one of the cars by a servant of the company employed upon the train, it was held that, notwithstanding he was not upon the train when the occurrence happened, and was standing at a place not intended for passengers, he was still entitled to the rights of one, and that the company was liable on the

2. *Buffett v. The Railroad*, 40 N. Y. 168, 36 Barb. 420. senger cannot recover for injuries due to a bundle being thrown

3. *Railway Co. v. Rhodes*, 86 Fed. 422, 30 C. C. A. 157. from the express car. *Winship v Railroad Co.*, 170 Mass. 464, 49

In view of St. 1894, c. 469, § 3, N. E. Rep. 647.

making railroads not liable for 4. *Railroad Co. v. Reynolds*, 24 negligence of expressmen on the Ky. L. Rep. 1402, 71 S. W. Rep. train not in their employ, a pas- 516.

grounds of negligence.⁵ So the company is liable to a passenger standing on the platform who is struck by a mail-bag thrown from the car by the United States mail agent, that being the place and method of delivery fixed upon, and the company having taken no precautions to warn passengers of the danger.⁶ But in the latter case there must be proof that such act was the habitual or frequent act of the mail agent, and that the company had notice or by the exercise of reasonable diligence might have known of such habit⁷

Sec. 1012. (§ 561a.) Same subject—Continues to be passenger though temporarily absent from vehicle.—So whenever, after a person has been received as a passenger and his carriage has been undertaken, the performance of the contract in the usual and proper way involves his leaving the vehicle, whether on business or for pleasure,⁸ and returning to it, the passenger is entitled to protection as such as well while so leaving and returning as at any other time; but during the interval of his

5. *Jeffersonville, etc. R. R. v. Riley*, 39 Ind. 568. 7 Tex. Ct. R. 172, 73 S. W. Rep. 411.

6. *Carpenter v. Railroad Co.*, 97 N. Y. 494; *Snow v. Railroad Co.*, 136 Mass. 552; *Railway Co. v. Rhodes*, 86 Fed. 422, 30 C. C. A. 157; *Galloway v. Railway Co.*, 56 Minn. 346, 57 N. W. Rep. 1058, 23 L. R. A. 442; *Hughes v. Railroad Co.*, 127 Mo. 447, 30 S. W. Rep. 127; *Sargent v. Railway Co.*, 114 Mo. 348, 21 S. W. Rep. 823, 19 L. R. A. 460; *Ayres v. Railroad Co.*, 158 N. Y. 254, 53 N. E. Rep. 22, *affirming* 40 N. Y. Supp. 11, 4 App. Div. 511.

7. *Railroad Co. v. Waggoner*, 90 Ill. App. 556; *Shaw v. Railway Co.*, 123 Mich. 629, 82 N. W. Rep. 618, 81 Am. St. Rep. 230, 49 L. R. A. 308; *Ayres v. Railroad Co.*, 77 Hun, 414, 28 N. Y. Supp. 789.

8. *Parsons v. Railroad Co.*, 113 N. Y. 355; *Railway Co. v. Mathes*, 7 Tex. Ct. R. 172, 73 S. W. Rep. 411.

"Where a passenger, without objection by the company or its agents, alights at an intermediate station which is a station for the discharge and reception of passengers, for any reasonable and usual purpose, like that of refreshment, of the sending or receiving of telegrams, or of exercise by walking up and down the platform, or the like, he does not cease to be a passenger, and is justified in the belief that the company is exercising due care for his safety." *Railway Co. v. Coggins*, 88 Fed. 455, 32 C. C. A. 1.

A person is entitled to the rights of a passenger who finds it necessary to change trains and is waiting on the platform, after leaving the first train, for the train which is to take him to his

absence, after his departure from the station and before his return to it, he is not to be regarded as a passenger.⁹ Illustrations of this are found where the passenger leaves the car temporarily at a station to obtain refreshments¹⁰ or to attend to business.¹¹ But a person is not to be considered a passenger where, having left the train with the intention to return and resume his journey at another time and on another train, he passes, during the interval, over the company's grounds as a mere short cut to another place at which he has business to transact not connected with his carriage.¹² And a distinction

destination. *Railway Co. v. Young*, 90 Fed. 709, 33 C. C. A. 251.

9. *Dodge v. Steamship Co.*, 148 Mass. 207; *Peniston v. Railroad Co.*, 34 La. Ann. 777; *Jeffersonville, etc., R. Co. v. Riley*, 39 Ind. 568; *Parsons v. Railroad Co.*, 113 N. Y. 355; *Dice v. Transportation Co.*, 8 Ore. 60.

In *State v. Railway Co.*, 58 Me. 176, it was held that where a passenger train is run on to a siding and stopped to permit another train to pass, and, while so waiting, a passenger destined for a distant station leaves the train for purposes of his own, he surrenders his character as passenger while so absent.

Where a river boat stops at a landing for two hours, a passenger for a point beyond may properly go ashore and is entitled to protection as a passenger while leaving the boat for that purpose. *Keokuk Packet Co. v. True* 88 Ill. 608.

Where a passenger leaves the train at an intermediate station and goes to a hotel, the relation of passenger ceases after he has left the station grounds, and does

not resume until he again goes to the depot to take the train. *King v. Railway Co.*, 107 Ga. 754, 33 S. E. Rep. 839.

Where a passenger leaves his car of his own volition for some purpose of his own, not incident to the journey he is pursuing, and at a place not designated for the discharge of passengers, he cannot claim protection as a passenger. *Railway Co. v. Sattler*, 64 Neb. 636, 90 N. W. Rep. 649, 97 Am. St. Rep. 666, 57 L. R. A. 890.

10. *Railroad Co. v. Shean*, 18 Colo. 368, 33 Pac. Rep. 108, 20 L. R. A. 729; *Railway Co. v. Coulson*, 8 Kan. App. 4, 54 Pac. Rep. 2; *Railway Co. v. Gray*, 6 Tex. Ct. Rep. 332, 71 S. W. Rep. 316.

11. *Watson v. Railroad Co.*, 92 Ala. 320, 8 So. Rep. 770; *Bullock v. Railway Co.*, (Tex. Civ. App.) 53 S. W. Rep. 184; *Railway Co. v. Overfield*, 19 Tex. Civ. App. 440, 47 S. W. Rep. 684; *Laub v. Railway Co.* (Tex. Civ. App.), 94 S. W. Rep. 550.

12. *Johnson v. Railroad Co.*, 125 Mass. 75. See also, *Railway Co. v. Anderson*, 28 S. C. R. 541, affirming 24 Ont. L. R. 672.

has been made between passengers on a through and local train, for, on a through train, as there are no passengers to discharge and none to receive at intermediate points, a stopping of the train for some purpose connected with its operation creates no necessity for the exercise of vigilance in the matter of attention to approaches to the train, and the company should not be held guilty of negligence in failing so to do.¹³

Sec. 1013. (§ 561b.) Same subject—Does not cease to be passenger by assisting carrier in emergency.—So a passenger does not cease to be such because he leaves the vehicle and assists the carrier at his request in an emergency. It was so held in the case of a passenger upon a street car. The car having been run too far past a siding where it was to pass another car, the driver requested plaintiff to get off and help him push it back. While so assisting the driver the plaintiff was struck and injured by the other car carelessly driven. It was urged by the defendant that plaintiff, by undertaking to assist the driver, became a fellow-servant of the company and could not recover, but the court held that he continued to be a passenger and was entitled to recover.¹⁴ And in another case, a passenger at the request of the conductor helped to carry a sick passenger back to the caboose at the rear of the train where he could be more properly cared for, and, in passing between the cars, the first passenger fell between them and was injured. He was held to be still a passenger and not a fellow-servant.¹⁵

The question of the negligence of the carrier or of the contributory negligence of the passenger in such case is usually one of fact for the jury.¹⁶

13. *Lemery v. Railway Co.*, 83 Minn. 47, 85 N. W. Rep. 908. 31 L. R. A. 261, 49 Am. St. Rep. 745, *affirming* 9 O. C. C. 230.

14. *McIntyre St. R'y Co. v. Bolton*, 43 Ohio St. 224. 16. *Railroad Co. v. Rayburn*, 153 Ill. 290, 38 N. E. Rep. 558,

15. *Railway Co. v. Salzman*, 52 Ohio St. 558, 40 N. E. Rep. 891, *reversing* 52 Ill. App. 277.

Sec. 1014. Same subject—Does not cease to be passenger by remaining on train after reaching his first destination with the intention to continue his journey to another point.—

“There is no rule of law which requires a passenger, if he has only paid his fare to a certain point of destination, which absolutely requires him to leave the train at that point; but, if he desires to continue his journey, it is manifestly his right to remain on the car and when demanded of him, pay his fare to the place of destination. It is but common knowledge that persons traveling upon railroad trains very frequently do not alight and stop at the place of destination originally contemplated when they entered the car, but proceed to some other point where business may call them, and under such circumstances they simply remain on the train and proceed with their journey.” In such case they are no less passengers in contemplation of law than if they had alighted from the train at the station originally contemplated, transacted business, and re-entered the coach for the purpose of continuing their journey. Alighting from the train and then re-entering it is a useless formality which the law does not impose upon any citizen in order to preserve his protection as a passenger.¹⁷

Sec. 1015. (§ 562.) Same subject—What elements must exist.—While, therefore, neither the payment of the price of the transportation nor the contract to carry, nor the two together, will generally make one a passenger until he has put himself within the carrier's protection, and the risk of the journey has begun, there may be circumstances under which the contract will create that relation, even before the transportation has been commenced. But unless some contract, either express or implied from the circumstances, can be shown, it is difficult to see how the relation can be held to be established. The mere intention to take passage upon the carrier's vehicle ought not, certainly, to have that effect under any circumstances.¹⁸ But if the intention and the act of the

17. *Anderson v. Railway Co.* 18. *June v. Railroad Co.*, 153
— Mo. —, 93 S. W. Rep. 394. Mass. 79, 26 N. E. Rep. 238; Rail-

party combined are such as to give rise to an implied contract to carry, the duty and obligation of the carrier as such at once begin. But so long as the party merely entertains the wish or intention, no obligation has arisen on either side, and he is at liberty to change that intention at any moment. When, however, he has done some act which puts him under an obligation to the carrier, the relation has commenced, and neither party can in good faith withdraw from it without the consent of the other.¹⁹ The case then becomes analogous to the bailment of goods to the common carrier, after which, as has been seen, the bailor cannot take them back without compensation to the carrier. So long, therefore, as the person who merely purposes to be carried is at perfect liberty to change his mind he is not a passenger, and for any injury which he may sustain through the negligence of the carrier he must seek redress as a stranger.²⁰ Otherwise a liability would be imposed upon the carrier without compensation or the right to it, and the law which would make him responsible in such a case for that utmost care which is required of the carrier of a passenger would be palpably unjust. It may, therefore, be doubted whether the cases which have gone so far as to hold that the mere being or waiting at a depot or station of a railroad, or at the place at which any carrier takes on or puts off his passengers, with the purpose of taking passage, but

road Co. v. Jennings, 190 Ill. 478, 60 N. E. Rep. 818, 54 L. R. A. 827, reversing 89 Ill. App. 335; O'Donnell v. Railway Co., 106 Ill. App. 287; Railway Co. v. Weeks, 99 Ill. App. 518; affirmed, Weeks v. Railway Co., 198 Ill. 551, 64 N. E. Rep. 1039; Hicks v. Railroad Co., — Neb. —, 107 N. W. Rep. 798.

In Webster v. Railroad Co., 161 Mass. 298, 37 N. E. Rep. 165, 24 L. R. A. 521, the plaintiff alleged that his intestate was a passenger on defendant's railroad. The evidence was that he had in his

pocket a ten-trip ticket between Boston and the station where the accident happened. He was running from the street across the company's tracks on its premises to catch a train about to start when he was struck and killed by another train. The court held that he had not become a passenger.

19. Murphy v. Railroad Co., 43 Mo. App. 342, citing Hutch. on Carr.

20. Railway Co. v. Stewart, 77 Ill. App. 66, citing Hutch. on Carr.

without having engaged or paid for it, although the party may have announced his intention to the agents of the carrier or to the carrier himself, can be sustained; for no obligation therefrom arises to continue of the same mind, and the party may at any time change it and withdraw. And the correct rule in such a case would seem to be that, if the person who thus intends to become a passenger receives an injury through negligence of the carrier or its servants, he could recover from it only upon the principle upon which the owner of premises would be liable to one whom he had invited to go upon them, and who there receives an injury by reason of their insecure and dangerous condition,²¹ or who had entered upon them as a customer on business.²²

Sec. 1016. Same subject—How long the relation of carrier and passenger continues.—As a general rule, it may be said that the relation of carrier and passenger does not cease with the arrival of the train at the passenger's destination, but continues until the passenger has had a reasonable time and opportunity to safely alight from the train at the place provided by the carrier for the discharge of passengers, and to leave the carrier's premises in the customary manner.²³ And

21. *Sweeny v. The Railroad*, 10 Allen, 368; *Indermaur v. Dames*, L. R. 1 Com. P. 274, L. R. 2 Com. P. 311; *Southcote v. Stanley*, 1 Hurl. & N. 247.

22. *Chapman v. Rothwell*, El., B. & E. 168; *Freer v. Cameron*, 4 Rich. 228; *Bigelow's Ld. Cas. on Torts*, 702.

23. *Pennsylvania Co. v. McCaffery*, 173 Ill. 169, 50 N. E. Rep. 713, *affirming* 68 Ill. App. 635; *Railroad Co. v. Tracey*, 109 Ill. App. 563; *Glenn v. Railroad Co.*, (Ind. App.), 73 N. E. Rep. 861; *s. c.* (Ind. Sup.) 75 N. E. Rep. 282; *Railroad Co. v. Batchler*, 32 Tex. Civ. App. 14, 73 S. W. Rep. 981, 83 S. W. Rep. 902; *Railway*

Co. v. Wood, 104 Fed. 663, 44 C. C. A. 118.

The mere fact that a passenger gets off the car on the side of the train opposite the depot does not, as a matter of law, make him a trespasser. Whether he is or not is dependent on the attendant facts and circumstances. And if the carrier's watchman accuses him of being a "hobo" and of getting off the "blind baggage," refuses to accept his explanation that he was a regular passenger and strikes him on the head with a club, the carrier will be liable in damages. *Railroad Co. v. Tracey*, 109 Ill. App. 563.

A person who takes the rail-

where the passenger is necessarily hindered or delayed in leaving the carrier's premises, the question whether he failed to depart within a reasonable time is one of fact for the jury.²⁴ But where a passenger, after having alighted from the carrier's vehicle, stopped for ten or fifteen minutes at the depot to engage in social converse with friends, and later, in leaving the carrier's premises, he fell over a railroad tie and was injured, it was held that the relation of carrier and passenger had, as a matter of law, terminated at the time the injury was received.²⁵ So where a peddler, after having arrived at his destination, proceeded to a section house some distance away from the station for the purpose of engaging in his regular business, and he was there assaulted by the carrier's section foreman, it was held that the relation of carrier and passenger had ceased, and that the carrier was consequently not liable.²⁶ But a failure to immediately leave the train by a passenger who is asleep has been held not to terminate the relation of carrier and passenger where those in charge of the train know that the stop is at the passenger's destination, and they fail to awaken him and acquaint him with the fact that he should alight.²⁷

Sec. 1017. (§ 563.) Same subject—Duty of protection does not depend on contract alone—Mail-carrier—Servant—Excursionist—Sunday traveler.—If the carriage of the passenger has

road track en route to his residence is no longer a passenger. *Railway Co. v. Beecher*, 65 Ark. 64, 44 S. W. Rep. 715.

If a passenger voluntarily re-enters the train for the purpose of using it as a means of crossing to the other side of the track, he is but a trespasser. *Rattersee v. Railway Co.*, (Tex. Civ. App.) 81 S. W. Rep. 566; *Hendrick v. Railroad Co.*, 136 Mo. 548, 38 S. W. Rep. 297.

If a person delays an unreasonable length of time in the depot

after alighting from the train, he is no longer a passenger. *Davis v. Railroad Co.*, 25 Tex. Civ. App. 8, 59 S. W. Rep. 844.

24. *Glenn v. Railroad Co.*, — Ind. —, 75 N. E. Rep. 282, *affirming*, s. c. (Ind. App.) 73 N. E. Rep. 861.

25. *Glenn v. Railroad Co.*, *supra*.

26. *Krantz v. Railway Co.*, 12 Utah, 104, 41 Pac. Rep. 717, 30 L. R. A. 297.

27. *Bass v. Railway Co.*, — Mich. —, 105 N. W. Rep. 151.

But where a person remains in

been undertaken, it will not be necessary to a recovery for the injury which may be occasioned by the carrier's negligence to show a contract, either express or implied, directly between him and the passenger. In other words, the obligation to the passenger may arise without privity of contract. Thus, where by contract with the government the carrier was bound to carry its mail-agent, and whilst being so carried the agent was injured by the negligence of the carrier, for which he brought suit, it was held that, though he could not avail himself of the contract between the defendant and the government and make it the foundation of a recovery, he could rest his claim upon the breach of the duty which the law always imposes upon every person who undertakes to perform a service for another, whether gratuitously or not, to exercise the degree of care and skill in its performance which the nature of the undertaking requires.²⁸ And the same is true of an express agent

the car for some length of time after it has arrived at his destination, he is no longer a passenger. *Kaase v. Railway Co.*, — Tex. Civ. App. —, 92 S. W. Rep. 444.

28. *Nolton v. The Railroad Corporation*, 15 N. Y. 444; *Blair v. Railway Co.*, 66 N. Y. 313; *Seybolt v. Railroad Co.*, 95 N. Y. 562, distinguishing *Pennsylvania R. Co. v. Price*, 96 Penn. St. 256; *Gulf, etc. R'y Co. v. Wilson*, 79 Tex. 371, 15 S. W. Rep. 280; *McGoffin v. Railway Co.*, 102 Mo. 540, 15 S. W. Rep. 76 (distinguishing *Railroad Co. v. Price*, *supra*, and *Price v. Railroad Co.*, 113 U. S. 218); *Mellor v. Railway Co.* 105 Mo. 455, 14 S. W. Rep. 758; *Grant v. Railroad Co.*, 108 N. C. 462, 13 S. E. Rep. 209; *Southern Pacific Co. v. Schuyler*, 68 C. C. A. 409, 135 Fed. 1015; *Cavin v. Southern Pacific Co.*, 136 Fed. 592, *aff'd*, So. Pac. Co. v. Cavin, — C. C. A. —, 144 Fed. 348; *Railway Co. v.*

Ketcham, 133 Ind. 346, 33 N. E. Rep. 116, 19 L. R. A. 339, 36 Am. St. Rep. 550; *Railroad Co. v. Kingman*, 18 Ky. L. R. 82, 35 S. W. Rep. 264; *Libby v. Railroad Co.*, 85 Me. 34, 26 Atl. Rep. 943, 20 L. R. A. 812; *Railway Co. v. Davis*, 17 Tex. Civ. App. 340, 43 S. W. Rep. 540; *Railway Co. v. McCullough*, 22 Tex. Civ. App. 208, 55 S. W. Rep. 392; *Railroad Co. v. Shott*, 92 Va. 34, 22 S. E. Rep. 811; *Railway Co. v. Wilson*, 79 Tex. 371, 26 S. W. Rep. 131, 11 L. R. A. 486; *Sproule v. Railway Co.* (Tex. Civ. App.) 91 S. W. Rep. 657. *Contra*, *Martin v. Railway Co.*, 200 Pa. 603, 50 Atl. Rep. 193; *Foreman v. Railroad Co.*, 195 Pa. St. 499, 46 Atl. Rep. 109.

But the Pennsylvania rule will not be applied in a case arising in Pennsylvania where the accident was the result of negligence on the part of employes of another and distinct company, the defendant

in charge of an express car carried by virtue of his employer and the railroad company.²⁹ For, though a person can become a passenger only by contract, express or implied, the obligation to carry with care may arise from duty.³⁰ And where the duty to carry was imposed by the law in a similar case, the injured passenger was permitted to recover upon the same ground.³¹ And so where the price of the passage of the servant was paid by his master, and the contract for the carriage was made with him, the servant was permitted to recover for an injury for which the carrier was responsible in his own name.³² So where a train of a railway company was hired by an association for an excursion, and the tickets for the trip were sold by the treasurer of the association, and the plaintiff had obtained one of them from him, and whilst a passenger upon the train with the ticket was injured by the negligence of the company's agents, it was held that the company was liable to him as its passenger, and that he might recover for the injury.³³ And where the passenger took his passage on Sunday, and was being carried on that day when the accident happened by which he was injured, although the contract was illegal on his part, being in violation of the law which prohibited traveling on that day except in cases of necessity or charity, and the contention of the carrier was that he was not entitled to recover for that reason, the answer of the court was that the foundation of the action was the breach of the duty imposed by law upon the carrier of passengers to carry safely so far as human skill and foresight would go, and that his liability was the same whether the action was brought upon the con-

simply having trackage rights, the mail agent then not being as to his legal rights on the same basis as employes of the railroad company. *Yarrington v. Delaware, etc. Co.*, 143 Fed. 565.

29. See following section.

30. *Union Pacific Railway v. Nichols*, 8 Kan. 505.

31. *Collett v. The Railway*, 16 Q. B. 984.

32. *Marshall v. The Railway*, 11 C. B. 655.

33. *Skinner v. The Railway*, 5 Exch. 787.

A passenger upon an excursion train is entitled to expect just as much care to be exercised for his safety as a passenger upon a regular train. A carrier cannot delegate its duties to an association for an excursion. *Railway Co. v.*

tract or upon the duty, and the evidence requisite to sustain it would be substantially the same.³⁴

Sec. 1018. (§ 564.) Same subject—Duty to one not passenger but lawfully on train—Express messenger—Porter—News agent—Lumberman.—It seems that if the person who is injured by the negligence of the employees of the carrier is lawfully upon its conveyance, even though he is not strictly a passenger, he will be entitled, in the absence of a contract on his part to the contrary, to the same care and diligence for his safety as one who is strictly a passenger. Thus where one was upon a train as an express messenger, carrying express freight under contract with the company, by which he was entitled to be carried without the payment of a distinct price for his passage, and was injured by the negligence of the company's agents in the management of the train, or in putting obstructions in its way, it was held that such messenger was entitled to the same care and circumspection on the part of the company and its agents in his carriage, as if he had been traveling upon the train as a passenger who had paid a distinct price for his transportation.³⁵ But, on the other hand, a con-

Anderson, 67 Ark. 123, 53 S. W. 673; Moore v. Railway Co., 67 Ark. 389, 55 S. W. Rep. 161; White v. Railroad Co., 115 N. Car. 631, 20 S. E. Rep. 191, 44 Am. St. Rep. 489; Collins v. Railway Co., 15 Tex. Civ. App. 169, 39 S. W. Rep. 643; Ward v. Railroad Co., 102 Wis. 215, 78 N. W. Rep. 442.

The same is true of a special train hired by the government for the transportation of its soldiers. *Railway Co. v. Parsley*, 6 Tex. Civ. App. 150, 25 S. W. Rep. 64.

34. *Carroll v. The Railroad*, 58 N. Y. 126; *Masterson v. Railway Co.*, 102 Wis. 571, 78 N. W. Rep. 757.

This is made the rule by statute in Massachusetts. *Jordan v.*

Railroad Co., 165 Mass. 346, 43 N. E. Rep. 111, 32 L. R. A. 101, 52 Am. St. Rep. 522.

35. *Chamberlain v. Pierson*, 87 Fed. 420, 31 C. C. A. 157, 59 U. S. App. 55; *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. Rep. 528; *Yeomans v. The Nav. Co.*, 44 Cal. 71; *Jennings v. Railroad Co.*, 15 Ont. App. 477; *Blair v. Railroad Co.*, 66 N. Y. 313; *Brewer v. Railroad Co.*, 124 N. Y. 59, 26 N. E. Rep. 324; *Kenney v. Railroad Co.*, 125 N. Y. 422, 26 N. E. Rep. 626; *Railway Co. v. Adams*, 6 Tex. Civ. App. 102, 24 S. W. Rep. 839; *Davis v. Railway Co.*, — Ky. L. R. —, 92 S. W. Rep. 339; *Shannon's Adm'r v. Railway Co.*, — Va. —, 52 S. E. Rep. 376.

tract between a railroad company and an express company that express messengers shall assume the risk of all accidents or injuries they may sustain in the course of their employment is not void as unreasonable or against public policy. And if an express messenger actually consents to be bound by the terms of such a contract, there can be no doubt that the contract may be pleaded in bar of any action brought by the express messenger against the railroad company for injuries received in the course of his employment.³⁶

There is, however, a sharp conflict of authority on the question whether an express messenger is chargeable with notice of the terms of a contract between the express and railroad companies. It has been held in the Federal courts²⁷ that, as he is carried only in the right of the express company, he is bound by the arrangement that company has made for him. In New York,³⁸ the Court of Appeals has held that he is not necessarily chargeable with notice of the provisions of the contract.

The same varying rules with regard to express messengers have been applied in cases affecting persons in a similar position on railroad trains, but following different avocations,

- 36.** *Baltimore & Ohio R'y Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. R. 385, 44 L. Ed. 560; *Railway Co. v. O'Brien*, 132 Fed. 593, 67 C. C. A. 421, *reversing* 116 Fed. 502; *Long v. Railroad Co.*, 130 Fed. 870, 65 C. C. A. 354; *Kelly v. Malott*, 135 Fed. 74, 67 C. C. A. 548; *Blank v. Railroad Co.*, 182 Ill. 332, 55 N. E. Rep. 332, *affirming* 80 Ill. App. 475; *Railway Co. v. Keefer*, 146 Ind. 21, 44 N. E. Rep. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348; *Railway Co. v. Mahony*, 148 Ind. 196, 46 N. E. Rep. 917; *Chicago, etc. R. Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257, 24 U. S. App. 589, 30 L. R. A. 161; *Bates v. Railroad Co.*, 147 Mass. 255, 17 N. E. Rep. 633; *Hosmer v. Railroad Co.*, 156 Mass. 506, 31 N. E. Rep. 652; *Peterson v. Railway Co.*, 119 Wis. 197, 96 N. W. Rep. 532, 100 Am. St. Rep. 879.
- Contra*, *Davis v. Railway Co.*, — Ky. L. R. — 92 S. W. Rep. 339; *Shannon's Adm'r v. Railway Co.*, 52 S. E. Rep. 376.
- 37.** *Long v. Railroad Co.*, 130 Fed. 870, 65 C. C. A. 354. This case follows and approves the dissenting opinion of Judge Earl in *Blair v. Erie Railway Co.*, 66 N. Y. 313, 23 Am. Rep. 55.
- 38.** *Brewer v. Railroad Co.*, 124 N. Y. 59, 26 N. E. Rep. 324.

such as porters on sleeping cars,³⁹ news agents,⁴⁰ fruit boys,⁴¹ and lumbermen on log trains.⁴²

Sec. 1019. (§ 565.) Same subject—Payment of fare not necessary to constitute one a passenger.—It is universally agreed that the payment of the fare, or price of the carriage, is not necessary to give rise to the liability. The carrier may demand its prepayment, if he chooses to do so, but if he permits the passenger to take his seat or to enter his vehicle as a passenger, without such requirement, the obligation to pay will stand for the actual payment, for the purpose of giving effect to the contract with all its obligations and duties. Taking his place in the carrier's conveyance, with the intention of being carried, creates an implied agreement upon the part of the passenger to pay when called upon, and puts him under a liability to the carrier, from which at once spring the reciprocal duty and responsibility of the carrier.⁴³ And in any action

39. *Railway Co. v. Hamler*, 215 Ill. 525, 106 Am. St. Rep. 187, 74 N. E. Rep. 705. (Railroad not liable;). *Russell v. Railway Co.*, 157 Ind. 305, 55 L. R. A. 253, 61 N. E. Rep. 678, 87 Am. St. Rep. 214 (contract allowed to be pleaded in bar); *Jones v. Railway Co.*, 125 Mo. 666, 28 S. W. Rep. 883, 26 L. R. A. 718, 46 Am. St. Rep. 514 (railroad company held liable).

40. *Railway Co. v. Fenwick*, (Tex. Civ. App.) 78 S. W. Rep. 548 (railroad company held liable); *Starr v. Railway Co.*, 67 Minn. 18, 69 N. W. Rep. 632 (railroad company held liable).

41. *Griswold v. Railroad Co.*, 53 Conn. 371 (railroad company held not liable).

42. *Railroad Co. v. Stewart*, 2 Tex. Ct. Rep. 498, 62 S. W. Rep. 1085 (railroad held liable); *Sanderson v. Panther Lumber Co.*, 50

W. Va. 42, 40 S. E. Rep. 368, 55 L. R. A. 908 (railroad company held not liable).

43. *Ohio, etc. R. R. v. Muhling*, 30 Ill. 9; *Russ v. The War Eagle*, 14 Iowa, 363; *Hurt v. The Railroad*, 40 Miss. 391; *Buffett v. The Railroad*, 40 N. Y. 168; *Austin v. The Railway Co.*, L. R. 2 Q. B. 442; *Doran v. The Ferry Co.*, 3 Lans. 105; *Railway Co. v. Lee*, 92 Fed. 318, 34 C. C. A. 365; *s. c.* 76 Fed. 212, 22 C. C. A. 132, 40 U. S. App. 298; *Railroad Co. v. Means*, 136 Fed. 83, 68 C. C. A. 65; *The Wasco*, 53 Fed. 546; *Gardner v. The Railroad*, 97 Ga. 482, 25 S. E. Rep. 334, 54 Am. St. Rep. 435; *Railroad Co. v. Huggins*, 89 Ga. 494, 15 S. E. Rep. 848, citing *Hutch. on Carr.*; *Railroad Co. v. Scott*, 111 Ill. App. 234; *Railroad Co. v. Scott's Adm'r*, 22 Ky. L. R. 30, 56 S. W. Rep. 674, 50 L. R. A. 381, citing *Hutch. on Carr.*; *Rail-*

which it may be necessary for the passenger to bring to recover for the injury which he has sustained by the negligence of his carrier, it will be sufficient to allege that he was ready to pay such a sum of money for his carriage as the carrier was legally entitled to charge.⁴⁴

Sec. 1020. (§ 565a.) Same subject—Child or other person carried free is passenger.—So a person accepted for carriage without payment or the expectation of payment of fare is entitled to be considered a passenger.⁴⁵ This rule has frequently been applied in the case of children.⁴⁶ Thus, a child riding upon a street-car by the invitation of the driver, without paying or intending to pay fare;⁴⁷ a child of tender age, carried in the arms of its mother, who was a paying passenger;⁴⁸ or a child of an age entitled to ride free and traveling with its parents, who were riding on a free pass, is a passenger and entitled to protection as such.⁴⁹ But a child or other person who

road Co. *v.* Barkley, 13 Ky. L. R. 331; *Randall v. Railroad Co.*, 45 La. Ann. 778, 13 So. Rep. 166; *Rawlings v. Railroad Co.*, 97 Mo. App. 511, 71 S. W. Rep. 534, citing *Hutch. on Carr.*; *Berry v. Railway Co.*, 124 Mo. 223, 25 S. W. Rep. 229; *Dorsey v. Railway Co.*, 83 Mo. App. 528; *Choate v. Railway Co.*, 67 Mo. App. 105, citing *Hutch. on Carr.*; *Simmons v. Railroad Co.*, 41 Ore. 151, 69 Pac. Rep. 440, 1022.

44. *Tarbell v. Railroad Co.*, 34 Cal. 616; *Frink v. Schroyer*, 18 Ill. 416; *Railroad Co. v. Scott*, 111 Ill. App. 234; *Morris v. Railway Co.*, 73 Hun, 560, 26 N. Y. Supp. 342.

Thus a person is entitled to protection as a passenger when he has boarded the train provided with a proper ticket, but is injured before he has had an opportunity to surrender his ticket or pay fare. *McKimble v. Railroad Co.*, 139 Mass. 542.

45. *Commonwealth v. Railroad Co.*, 108 Mass. 7; *Railroad Co. v. Flinn*, 24 Kan. 627; *Railroad Co. v. Axley*, 47 Ill. App. 307.

46. If the carrier follows a general custom of permitting children to ride on its cars free of charge when accompanied by some older person who pays fare, a child who enters the car under such circumstances is a passenger with all the rights as such. *Rawlings v. Railroad Co.*, 97 Mo. App. 511, 71 S. W. Rep. 534.

47. *Wilton v. Railroad Co.*, 107 Mass. 108; *Wilton v. Railroad Co.*, 125 Mass. 130; *Metropolitan St. R'y Co. v. Moore*, 83 Ga. 453.

So when carried on board a vessel. *Cook v. Navigation Co.*, 76 Tex. 353.

48. *Austin v. Railway Co.*, L. R. 2 Q. B. 442.

49. *Littlejohn v. Railroad Co.*, 148 Mass. 478.

gets upon a car or train without intending to pay fare, and without the knowledge of the carrier, or his express or implied consent or invitation to ride as a passenger, is not a passenger, but at most a stranger, if not a trespasser, and is entitled to but ordinary care.⁵⁰ Nor can an infant maintain an action against the carrier for injuries received before birth.⁵¹

11. *Gratuitous passenger.*

Sec. 1021. (§ 566.) Care and diligence due to a gratuitous passenger.—It is enough that the person is being lawfully carried as a passenger to entitle him to all the care which the law requires of the passenger carrier; and the same vigilance and circumspection must be exercised to guard him against injury when he is carried gratuitously, as upon what is known as a free pass, or by the carrier's invitation, as when he pays the usual fare. The leading case upon this point is that of *The Philadelphia & Reading Railroad Company v. Derby*,⁵² in which it appeared that the president of one railroad company had invited that of another to take a ride upon the road of the former. This invitation was accepted, and, during the ride, the invited president was injured by a collision upon the road, caused by the negligence of its agents, for which he sued the road. It was urged, on behalf of the defendant road, that no damages could be recovered for an unintentional injury by one who was, at the time, merely partaking of the hospitality of the defendant, and with whom there was no contract, either express or implied. But this defense was not sustained by the court, and it was held that the plaintiff, having been lawfully on the road at the time of the collision, none of the antecedent circumstances or accidents of his situation could affect his right to recover; and it was said that, independently

50. *Railroad Co. v. Flinn*, 24 App. 441; *Daubert v. Western Meat Co.*, 139 Cal. 480, 73 Pac. Kan. 627.

51. *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N. E. Rep. 638, 52. 14 How. 468.
48 L. R. A. 225, *affirming* 76 Ill.

of the question of contract, the defendant was under an obligation of duty to carry the plaintiff safely. This duty, it was said, does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.⁵³

Sec. 1022. (§ 567.) Same subject—The rule stated.—This, it will be observed, is different from the well-settled rule in regard to the gratuitous carriage of goods, which, as has been seen, does not impose upon the common carrier the same degree of responsibility as when the carriage is for compensation, and this illustrates the different light in which the two kinds of business are viewed by the law. The carrier of goods becomes an insurer of their safety only when he is paid to become so; but the carrier of the passenger is bound to the utmost care and caution, whether paid by the passenger or not; and this distinction is based upon wholly different reasons of public policy, being, in the one case, the value which it puts upon human life and personal safety, and in the other, the necessity of preventing frauds and combinations, to the “undoing of all persons” who may have dealings of that kind with the carrier. This distinction between the gratuitous bailment of goods to the carrier, and the gratuitous carriage of the passenger, is, upon this ground, well established, and, in the latter case, the carrier’s liability is the same as when he is paid for the carriage.⁵⁴

53. *Coggs v. Bernard*, 1 Smith’s Ld. Cases, 283.

54. *Thompson v. Railroad Co.*, 47 La. Ann. 1107, 17 So. Rep. 503; *Rogers v. Steamboat Co.*, 86 Me. 261, 29 Atl. Rep. 1069, 25 L. R. A. 491; *McNeill v. Railroad Co.*, 135 N. Car. 682, 47 S. E. Rep. 765, citing *Hutch. on Carr.*; *Williams v. Railroad Co.*, 18 Utah, 210, 54 Pac. Rep. 991, 72 Am. St. Rep. 777;

Chattanooga Rapid Transit Co. v. Venable, 105 Tenn. 460, 58 S. W. Rep. 861, 51 L. R. A. 886; *Simmons v. Railroad Co.*, 41 Ore. 151, 69 Pac. Rep. 440, 1042; *Gillenwater v. The Railroad*, 5 Ind. 339; *Washburn v. The Railroad*, 3 Head, 638; *Littlejohn v. Railroad Co.*, 148 Mass. 478; *Wilson v. Railroad Co.*, 107 Mass. 108; 125 Mass. 130; *Commonwealth v. Railroad Co.*, 108

12. *Fare and its payment.*

Sec. 1023. (§ 567a.) Amount of fare—State regulation—Discriminations.—The amount of fare that may be charged by public carriers is, in modern times and particularly in the case of such important carriers as railroad, street railway, sleeping-car and ferry companies, usually regulated by statute. Such regulation, as has been seen,¹ where it is reasonable in its limits and does not amount to confiscation or the taking of private property for public use without compensation, is held to be within the power of the state legislatures.²

Where no such statute is found, however, the carrier is entitled to demand and receive, and the passenger is entitled to be carried upon tendering, a reasonable compensation,³ and what is reasonable is, here as in other cases, ordinarily a question of fact to be determined in view of all the circumstances of each particular case.⁴ If the rate has been fixed by usage, the passenger, in the absence of special circumstances, would be entitled to carriage upon tendering the usual rate.⁵

So here, as in the case of the carriage of goods,⁶ the passenger is entitled to be carried without unusual, unjust and

Mass. 7; *Prince v. Railway Co.*, 64 Tex. 144; *Austin v. Railway Co.*, L. R. 2 Q. B. 442.

1. *Ante*, § 574 *et seq.*

2. *Wellman v. Railway Co.*, 83 Mich. 592; *Munn v. Illinois*, 94 U. S. 113; *Railroad Co. v. Iowa*, 94 U. S. 155; *Peik v. Railway Co.*, 94 U. S. 164; *Railroad Co. v. Ackley*, 94 U. S. 179; *Ruggles v. Illinois*, 108 U. S. 526; *Stone v. Trust Co.*, 116 U. S. 307; *Dow v. Beidelman*, 125 U. S. 680; *Banking Co. v. Smith*, 128 U. S. 174; *Railway Co. v. Minnesota*, 134 U. S. 418; *Railway Co. v. Gill*, 54 Ark. 101, 15 S. W. Rep. 18.

A legislative act requiring the

railroads to issue free transportation to shippers of live stock and naming no consideration, such as that the shipper should care for the stock, is unconstitutional. *Railway Co. v. Campbell*, 61 Kan. 439, 59 Pac. Rep. 1051, 48 L. R. A. 251, *reversing* (Kan. App.) 56 Pac. Rep. 509.

3. *Spofford v. Railroad Co.*, 128 Mass. 326; *McDuffee v. Railroad Co.*, 52 N. H. 430; *Johnson v. Railroad Co.*, 16 Fla. 623.

4. *Ante*, § 521.

5. *Spofford v. Railroad Co.*, *supra*; *Ante*, § 521.

6. *McDuffee v. Railroad Co.*, *supra*; *Ante*, § 521.

unreasonable discrimination.⁷ This does not mean that all passengers shall be carried for the same rate, but that no passenger, under usual conditions, shall be required to pay more than the statutory rate if any is fixed, or more than the usual rate where the rate has been so established, or more than a reasonable rate where neither a statute nor a usage has prescribed the amount.⁸

Sec. 1024. (§ 567b.) Payment of fare—How made—Making change.—As will be seen in the following sections, it is competent for the carrier to require those desiring to become passengers to purchase tickets before entering the vehicle, and either to refuse to carry them at all without tickets, or to do so only upon the payment of a greater fare. He may also require prepayment of the fare. In the absence of such requirements, however, it is sufficient if the passenger is ready to pay when demanded of him during the journey, and where he in good faith enters the vehicle, being ready and willing to pay when the fare is so demanded, he is properly to be regarded as a passenger.⁹ Such a passenger is entitled to a reasonable time and opportunity to pay, as to go from one car to another of a railroad train to obtain the money.¹⁰ He is not bound to have and tender the exact change, but may tender his fare in lawful

7. *Johnson v. Railroad Co.*, *supra*; *Spofford v. Railroad Co.*, *supra*; *Atwater v. Railroad Co.*, 48 N. J. L. 55; *Phillips v. Railway Co.*, 114 Ga. 284, 40 S. E. Rep. 268.

A railroad company cannot of itself make or authorize such use to be made of its right of way as would enable it to collect from the traveling public a greater rate of fare than by law it would be permitted to collect. *Southern Pac. Co. v. Patterson*, 7 Tex. Civ. App. 451, 27 S. W. Rep. 194.

8. *Ante*, § 521; *Spofford v. Railway Co.*, *supra*.

If a passenger tenders the statutory legal fare, and is ejected, he is entitled to damages. And where the ejection takes place in the presence of 30 to 35 passengers, and he is compelled to walk 5 miles, \$650 damages are not excessive. *Chamberlain v. Railway Co.*, 122 Mich. 477, 81 N. W. Rep. 339.

9. *White v. Railway Co.*, 26 W. Va. 800; *Bartlett v. Steamboat Co.*, 57 N. Y. Super. 345, *Ford v. Railroad Co.*, 110 La. 414, 34 So. Rep. 585.

10. *Clark v. Railroad Co.*, 91 N. C. 506.

money in a reasonable sum, and the carrier must accept such tender and furnish change to a reasonable amount.¹¹

Sec. 1025. (§ 567c.) Same subject—Who liable for fare—Adult and child.—A person who takes with him on his own account another person as a traveling companion is, of course, liable for that other's fare.¹² Thus a person traveling with a child in his custody is liable for the payment of the child's fare, and he may be ejected with the child when he refuses to pay the latter's fare.¹³

So, conversely, where a parent traveling with his or her child has paid the proper fare for the child, but the conductor wrongfully refuses to recognize the child's right to ride, though offering to carry the parent, and ejects the child, the parent may get off also and recover for the wrongful ejection of both.¹⁴

Sec. 1026. (§ 567d.) Same subject—Paying fare or buying ticket with counterfeit money.—As payment in counterfeit

11. *Barrett v. Railway Co.*, 81 Cal. 296, distinguishing *Fulton v. Railroad Co.*, 17 U. C. (Q. B.) 428. In the *Barrett* case a tender of a five-dollar gold piece, the smallest sum he had, for a five-cent fare on a street railroad, was held reasonable. In the *Fulton* case, tender of \$20 for a fare of \$1.35 was held unreasonable.

A genuine coin which, though worn smooth by use, is not appreciably diminished in weight or undistinguishable in denomination, is a valid tender. *Morgan v. Railroad Co.*, 52 N. J. L. 60, 558.

But a conductor is not bound to accept a dollar bill from which a portion has been torn which might aid in determining whether it is genuine. *Railway Co. v. Anderson*, 61 N. J. Law 248, 39 Atl. Rep. 905, 68 Am. St. Rep. 703.

Nor is he obliged to accept the

passenger's jewelry as a pledge to secure the fare. *Railway Co. v. Smith*, (Tex. Civ. App.) 84 S. W. Rep. 852.

12. This rule applies where both are adults, as, for instance, brother and sister, and one has assumed the care and responsibility of the other in such a way as to become liable for the fare. *Railway Co. v. Faulkner* (Tex. Civ. App.) 56 S. W. Rep. 253, 63 S. W. Rep. 655.

13. *Philadelphia, etc. R. Co. v. Hoefflich*, 63 Md. 300; *Pittsburgh, etc. R. Co. v. Dewin*, 86 Ill. 296; *Warfield v. Railroad Co.*, 104 Tenn. 74, 55 S. W. Rep. 304, 78 Am. St. Rep. 911, citing *Hutch. on Carr.*

14. *Gibson v. Railroad Co.*, 30 Fed. Rep. 904; *Braun v. Railway Co.*, 79 Minn. 404, 82 N. W. Rep. 675, 984, 49 L. R. A. 319, 79 Am. St. Rep. 497.

money, though believed by both parties to be genuine, is not a good payment, the passenger who has paid his fare or bought a ticket with counterfeit money, though innocently, must pay in genuine money when the fact is discovered, and if discovered before the journey is completed, he may be ejected if he refuses to make it good.¹⁵

Sec. 1027. Same subject—Effect of statutory requirement that conductor wear badge to show his authority to collect fares.—Although a statute may require a conductor to show his authority to collect fares and tickets by wearing a badge, indicating his office, in a conspicuous place, wherever a passenger recognizes a conductor as such without a badge, the carrier will not be liable where the conductor ejects the passenger on his refusal to pay fare for other reasons.¹⁶

13. *Tickets.*

Sec. 1028. (§ 568.) The contract to carry—Tickets.—A great proportion of passenger travel is done without an express contract between the carrier and his passenger; and the number of those who travel as passengers upon street railways, omnibuses, hackney-coaches, ferry-boats and the like, which are used by great numbers of persons daily, as a convenient means of having themselves transported for short distances, and for the carriage upon which an express contract is rarely made, is much greater than of those who travel on long journeys, and whose carriage is generally undertaken by express contract. Passengers, however, who are carried under the contract which, as has been seen, is always implied in behalf of those who are being lawfully carried in public conveyances, have thrown around them the best protection which the law can afford, in the high degree of responsibility for care and diligence which it imposes upon the carrier. The right to this protection is generally, although not necessarily, evidenced by

15. *Memphis, etc. R. Co. v. Chastine*, 54 Miss. 503. 16. *Cox v. Railway Co.*, 109 Cal. 100, 41 Pac. Rep. 794.

a ticket which may be either in the form of a mere check, showing the points between which the passenger is entitled to be carried, or in the form of a receipt and an express contract containing an acknowledgment of the receipt of the passenger's fare, and the obligation to carry him for the purposes and upon the terms specified. If the ticket is a mere check, the passenger is not obliged to read conditions on its back, nor is he bound by them without his express assent. But, if the ticket purports to be a contract ticket, of a kind and size that no one who could read could glance at it without seeing that it undertakes expressly to govern the conduct of the parties until the passenger arrives at his destination, the passenger will be expected to read it, and if he fails to do so, he will nevertheless be bound by its lawful stipulations. The fact that it is not signed by the passenger will be immaterial,¹⁷ although any restrictions or limitations upon the passenger's rights must be supported by some consideration in the shape of a reduced fare, or otherwise.¹⁸ But the mere fact, it is said, that the passenger pays a reduced fare for his ticket will be sufficient to put him on notice that the ticket may contain restrictions upon the carrier's liability, and, by accepting such a ticket, he will be bound by its lawful limitations.

Sec. 1029. (§ 569.) Such tickets in universal use.—Such tickets are of universal use in railroad travel; and the fact that railway carriers of passengers, from the numbers they carry, the great rapidity and regularity with which their trains must be run, the constant changes which are taking

17. *Fonseca v. Steamship Co.*, 517, 44 S. E. Rep. 83, 95 153 Mass. 553, 27 N. E. Rep. 665; *Aiken v. Railway Co.*, 118 Ga. 118, 44 S. E. Rep. 828, 98 Am. St. Rep. 107; *Steers v. Steamship Co.*, 57 N. Y. 1; *Wilton v. S. Nav. Co.*, 10 C. B. (N. S.) 453; *Lindsey v. Steamship Co.*, 88 N. Y. Supp. 371; *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. Rep. 841, 68 Am. St. Rep. 146; *Norman v. Railway Co.*, 65 S. Car. 517, 44 S. E. Rep. 83, 95 Am. St. Rep. 809. See also *post*, § 1052.
18. *Walker v. Price*, 62 Kan. 327, 62 Pac. Rep. 1001, 84 Am. St. Rep. 392; *Railroad Co. v. Turner*, 100 Tenn. 214, 47 S. W. Rep. 223, 43 L. R. A. 140; *Norman v. Railway Co.*, 65 S. Car. 517, 44 S. E. Rep. 83, 95 Am. St. Rep. 809.

place in their passengers at every station, and the dispatch with which all the details of the business of such trains must be attended to whilst in motion, cannot be afforded the opportunity to collect his fare from each passenger while upon their trains, has made it necessary to allow to such companies, in the matter of making and enforcing regulations as to the purchase and exhibition of such tickets, when required, a power but little less than absolute. For a refusal to comply with all reasonable by-laws and regulations upon this subject, such carriers have the undoubted right to eject the passenger from their cars; and this right will depend only upon the question whether such regulations are reasonable, with reference to all the circumstances and requirements of the business for the interest of the carrier, and to the convenience and accommodation of the public.

Sec. 1030. (§ 569a.) Duty to sell tickets to those applying for them.—Where the purchase of tickets is required, as it may be, or where they are put on sale and any advantage arises from their possession, it is undoubtedly the duty of the company to furnish them without discrimination to all persons applying for them who are ready and willing to pay for them and who are entitled to be accepted as passengers.

Thus it was held that while a railroad company is under no legal obligation to sell commutation tickets, yet having established commutation rates and offered such tickets to the public, it could not without just reason discriminate against a particular individual by refusing to sell them to him. Performance of the duty to sell was enforced by *mandamus*.¹⁹

19. *Atwater v. Railroad Co.*, 48 N. J. L. 55. But see *Spafford v. Railroad Co.*, 128 Mass. 326.

A railroad company which sells mileage tickets must sell them impartially to all the public who apply for them. *Larrison v. Railway Co.*, 1 Interstate Com. Rep. 147; *In re Passenger Tariffs*, 2 *id.* 649.

A discrimination in rates in favor of a special class of passengers, *e. g.*, commercial travelers, on the ground that they are supposed to create freight traffic for the road, is not justifiable (*Larrison v. Railway Co.*, 1 Interstate Com. Rep. 147); nor on the ground that thereby the carrier's present or future business

Sec. 1031. Effect of exchange of tickets on stipulations therein.—At any time before entering upon the journey, a passenger may exchange one ticket with its limitations for another containing different stipulations, and the old stipulations with the cancellation of the old ticket furnish the consideration for the substitution of the new ticket.²⁰

Sec. 1032. (§ 570.) Carrier may require passengers to purchase tickets and exhibit them before entering trains.—It is undoubtedly competent for a railroad company, as a means of protection against imposition and to facilitate the transaction of its business, to require passengers to procure tickets before entering the car,²¹ and where this requirement is duly made known and reasonable opportunities are afforded for complying with it,²² it may be enforced either by expulsion from the train regardless of a tender of the fare in money,²³ or, as will

will be thereby stimulated; or the settlement of the country promoted; or that those in whose favor the discrimination is made are persons of small means intending to settle in the northwest (*Smith v. Railroad Co.*, 1 Interstate Com. Rep. 208); but there is nothing illegal in making a rate for emigrants as a class, and refusing to give the same rate to others to whom different accommodations are furnished. *Savery v. Railroad Co.*, 2 Interstate Com. Rep. 338.

20. *O'Regan v. Steamship Co.*, 160 Mass. 356, 35 N. E. Rep. 1070, 39 Am. St. Rep. 484.

21. *Cleveland, etc. R. Co. v. Bartram*, 11 Ohio St. 457; *Railroad Co. v. Louthan*, 80 Ill. App. 579; *Mills v. Railway Co.*, 94 Tex. 242, 59 S. W. Rep. 874, 55 L. R. A. 497, reversing (Tex. Civ. App.) 57 S. W. Rep. 291.

22. See following section.

23. *Reese v. Railroad Co.*, 131 Penn. St. 422. See also, *Lane v. Railroad Co.*, 5 Lea, 124; *Illinois Cent. R. Co. v. Nelson*, 59 Ill. 110; *Jones v. Railway Co.*, 17 Mo. App. 158; *Indianapolis, etc. R. Co. v. Kennedy*, 77 Ind. 507; *Falkner v. Railway Co.*, 55 Ind. 369; *Toledo, etc. R'y Co. v. Wright*, 68 Ind. 586; *Lake Shore R'y Co. v. Greenwood*, 79 Penn. St. 373; *Poole v. Railroad Co.*, 16 Ore. 261; *Reese v. Penn. Co.*, 131 Penn. St. 422; *Swan v. Railroad Co.*, 132 Mass. 116; *Hoffbauer v. Railroad Co.*, 52 Iowa, 342; *McCook v. Northup*, 65 Ark. 225, 45 S. W. Rep. 547; *Railroad Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. Rep. 971, citing *Hutch. on Carr.*

In the first edition of this work the learned author expressed the following opinion in the text of this section: "If, however, in disregard or ignorance of such regu-

be seen in the following section, by requiring the payment of a larger fare upon the train than that for which the ticket might have been procured.²⁴

So it is held to be a reasonable regulation to require passengers to exhibit their tickets to a gate-keeper and have them punched before entering the train, and the company may enforce such a regulation or prevent its violation by the use of such reasonable force as is necessary to that end,²⁵ although

lation (that passengers shall procure tickets as a condition of the right to enter the cars), one who desired to be carried, without any fraudulent intent to impose upon the carrier, should obtain entrance into a car, he could not be treated as a trespasser, and would be entitled to the rights of a passenger; and, not being there with any dishonest or unlawful purpose, if ready and willing to pay the price of his carriage when demanded, he could not be ejected for his previous noncompliance with the regulation, but might demand his carriage to his intended destination upon an offer to pay according to the carrier's rates. However reasonable such a condition might be as a regulation for the convenience of the carrier, a failure to comply with it before the inception of the journey could not be considered as a reasonable ground for ejecting the passenger after it had commenced."

This language is approved in *Railroad Co. v. Garrett*, 8 Lea, 438.

The statement of the present text seems, however, to be sustained by the authorities. Most of the cases were cases where freight trains were in question, but in the Reese Case the rule is

said to apply as well to passenger trains.

24. See the following section:

25. *Dickerman v. Union Depot Co.*, 44 Minn. 433. Said Gilfillan, C. J.: "No claim is made, and none could well be made, against the reasonableness of the rules of the defendant requiring persons passing through the gates for the purpose of taking trains to exhibit their tickets to the gatekeeper and have them punched by him, and providing that no passenger shall be allowed to pass out of any gate after the train indicated by his ticket has started, or to board any train while in motion. Such or similar rules would seem absolutely necessary to preserve to the defendant control of its grounds, and to enable it to receive and discharge passengers with order, and to the safety, comfort and convenience of the passengers. All persons having notice of such rules, and a reasonable opportunity to comply with them, are bound to observe them in order to have a right to pass through the gates or to take a train at defendant's depot; and the defendant has a right to enforce such rules, and to prevent their violation, and to use such force as may be reason-

the company will be liable for an unjustifiable assault by a gate-keeper on a passenger who has purchased a ticket.²⁶

A regulation, however, requiring passengers to exhibit their tickets to a gate-keeper, and have them punched before entering the train, will not be considered reasonable if it subjects the passenger to unnecessary inconvenience or annoyance when the passenger is himself in no manner at fault. And if a passenger presents a ticket to the gate-keeper, which, owing to no fault of his own, does not purport on its face to be a ticket entitling him to ride upon the train he is about to take, and he is consequently refused admittance through the gate, a regulation that, in such cases, the passenger must refer the ticket to the ticket agent for his indorsement as to its validity, is unreasonable where it is shown that the gate-keeper opens the gate only a few moments before the train leaves the station, and that the ticket agent, in order to pass upon its validity, might find it necessary to examine corresponding coupons to several hundred tickets.²⁷

Sec. 1033. (§ 571.) Same subject—Requiring higher fare when paid on train—Reasonable facilities for procuring ticket must be furnished.—So it is well settled that a regulation or by-law of the carrier is not unreasonable which provides that when such tickets are not procured before the commencement of the journey, and the carrier is therefore put to the inconvenience of collecting from the passenger his fare during its progress, the price of the carriage shall be more than would have been charged for the ticket, and that upon the refusal of the passenger to pay the higher fare, not extortionate in amount,²⁸ he shall be ejected. And if adopted in good faith,

ably necessary to that end. If in no such case it may use force, then the right to enforce the rules and prevent their violation is but a barren right."

26. *Railway Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. Rep. 219.

27. *Railway Co. v. O'Conner*, 76

Md. 207, 24 Atl. 449, 16 L. R. A. 449, 35 Ann. St. Rep. 422.

28. *White v. Railway Co.*, 26 W. Va. 800; *Railway Co. v. Beckett*, 11 Ind. App. 547, 39 N. E. Rep. 429.

A rule of the carrier which requires that, where cash fare is paid, an extra amount shall be

and with a view to facilitate the business of the carrier, there can be certainly nothing unreasonable or unjust in such rules, especially in the case of railway carriers.²⁹

But as a condition precedent to the existence of this right of expulsion for the refusal to procure a ticket or to pay the higher fare, an opportunity, at least reasonable,³⁰ and such as

collected above the regular fare is not valid when the cash fare, together with the extra amount, exceeds the maximum rate allowed by law. *Railroad Co. v. Dickerson*, 4 Kan. App. 345, 45 Pac. Rep. 975; *Fulmer v. Railway Co.*, 67 S. Car. 262, 45 S. E. Rep. 196; *Zagelmeyer v. Railroad Co.*, 102 Mich. 214, 60 N. W. Rep. 436, 47 Am. St. Rep. 514.

29. *Stephen v. Smith*, 29 Vt. 160; *Chicago, etc. R. R. v. Roberts*, 40 Ill. 503; *State v. Goold*, 53 Me. 279; *Indianapolis, etc. R. R. v. Rinard*, 46 Ind. 293; *Hilliard v. Goold*, 34 N. H. 230; *Pullman, etc. Co. v. Reed*, 75 Ill. 125, Ill. Central R. R. *v. Nelson*, 59 *id.* 110; *Toledo, etc. R. R. v. Patterson*, 65 *id.* 304; *Moore v. The Railroad*, 4 Gray, 465; *Chicago, etc. R'y Co. v. Herring*, 57 Ill. 59; *Reese v. Pennsylvania Co.*, 131 Pa. St. 422; *Crocker v. Railroad Co.*, 24 Conn. 249; *Swan v. Railroad Co.*, 132 Mass. 116; *State v. Chovin*, 7 Iowa, 204; *Du Laurans v. Railroad Co.*, 15 Minn. 49; *State v. Hungerford*, 39 Minn. 6; *Chicago, etc. R. Co. v. Parks*, 18 Ill. 460; *Railroad Co. v. Skillman*, 39 Ohio St. 457; *Forsee v. Railroad Co.*, 63 Miss. 67; *Wilsey v. Railroad Co.*, 83 Ky. 511; *Bland v. Railroad Co.*, 55 Cal. 570; *Hoffbauer v. Railroad Co.*, 52 Iowa, 342; *McGowen v. Railroad Co.*, 41 La. Ann. 732; *Railroad Co. v. Asmore*, 88 Ga. 529, 15 S. E. Rep. 13, 16 L. R. A. 53; *Railroad Co.*

v. Bauer, 66 Ill. App. 124; *Railroad Co. v. Quisenberry*, 48 Ill. App. 338; *Railroad Co. v. Mays*, 4 Ind. App. 413, 30 N. E. Rep. 1106; *Sage v. Railroad Co.*, 134 Ind. 100, 33 N. E. Rep. 771; *Snellbaker v. Railroad Co.*, 94 Ky. 597, 23 S. W. Rep. 509; *Cross v. Railway Co.*, 56 Mo. App. 664.

It is immaterial whether other persons or the same person at different times have been allowed to ride on the train for ticket fare paid on the train. A violation of the rules by other conductors, or at other times by the same conductor, can give no rights to a passenger who has not procured his ticket and is asked to pay a higher fare on the train in accordance with the regulations of the company. So it is also immaterial in an action for alleged wrongful ejection that plaintiff offered his fare in good faith, believing it to be the correct amount, for his belief could not affect the contract between the carrier and himself. *Sage v. Railroad Co.*, 134 Ind. 100, 33 N. E. Rep. 771.

30. *Ammons v. Railway Co.*, 138 N. Car. 555, 51 S. E. Rep. 127, citing *Hutch. on Carr.*; s. c. 52 S. E. Rep. 736; *Rivers v. Railroad Co.*, 86 Miss. 571, 38 So. Rep. 508; *Mills v. Railway Co.*, 94 Tex. 242, 59 S. W. Rep. 874, 55 L. R. A. 497, *reversing* (Tex. Civ. App.) 57 S. W. Rep. 291.

the statute requires where a statute exists,³¹ must have been afforded by the carrier to the passenger, not himself in fault,³²

It cannot justly be said that it is reasonable to require the passenger to pay more than regular rates on the train even though a process be created by which he may at some future time get back the excess, unless the passenger has first had an opportunity to purchase a ticket at the station from which he starts. *Phettiplace v. Railroad Co.*, 84 Wis. 412, 54 N. W. Rep. 1092, 20 L. R. A. 483.

A railroad company is not bound to keep a ticket office open each and every minute up to the time it may lawfully close the same, and, on the other hand, a person is not obliged to call again and again at the office to procure a ticket. *Central R. & B. Co. v. Strickland*, 90 Ga. 562, 16 S. E. Rep. 352.

This reasonable opportunity includes a reasonably convenient place, open and attended by a proper agent, for a reasonable time previous to the departure of the train, to enable the passenger to procure his ticket and enter the train. *State v. Hungerford*, 39 Minn. 6.

What is reasonable depends, in this as in other cases, upon the circumstances of each particular case, as upon the size of the station, the number of trains stopping at it, the amount of business done there and the number of passengers who usually apply for tickets. Thus, at small stations where there is but one agent, whose duties require him to be out on the platform when the train arrives, a railroad company is not

bound to keep its ticket office open and attended to the last moment before the departure of the train. *Everett v. Railway Co.*, 69 Iowa, 15. See also, *Chicago, etc. R'y Co. v. Brisbane*, 24 Ill. App. 463.

31. The subject is regulated by statute in some states. See *Railroad Co. v. Hogue*, 50 Kan. 40, 31 Pac. Rep. 698; *Railway Co. v. Gist*, 31 Tex. Civ. App. 662, 73 S. W. Rep. 857; *Railroad Co. v. Lister*, 6 Tex. Ct. R. 58, 72 S. W. Rep. 107.

32. *Phillips v. Railway Co.*, 114 Ga. 284, 40 S. E. Rep. 268; *Railroad Co. v. Mays*, 4 Ind. App. 413, 30 N. E. Rep. 1106; *Railway Co. v. Wright*, 18 Ind. App. 125, 47 N. E. Rep. 491.

Thus a passenger cannot complain if he does not get to the station till after the usual time for the departure of the train, and then finds the ticket office closed. *Swan v. Railroad Co.*, 132 Mass. 116; *St. Louis, etc. R. Co. v. South*, 43 Ill. 176; *Railroad Co. v. Bauer*, 66 Ill. App. 124; *Wicks v. Railroad Co.*, 15 Ky. L. R. 605.

But the rule cannot apply where the carrier has wrongfully refused to sell a ticket. *Indianapolis, etc. R'y Co. v. Rinard*, 46 Ind. 293.

A passenger who has entered the train without a ticket cannot require that the train shall wait at a station long enough to enable him to leave the train, buy a ticket and return. *Easton v. Waters*, (Tex. Civ. App.) 16 S. W. Rep. 540.

to provide himself with the required ticket. If, therefore, no office be kept or opened at the proper time, nor other adequate facilities be provided for the purpose of supplying passengers with them, or if the office provided for the purpose be closed before the time fixed by law or by a rule of the carrier, and for either reason the passenger has been unable to obtain a ticket, the higher rate cannot be lawfully demanded.³³ And if, without having afforded such proper facilities to the passenger, the carrier should exact from him the additional charge for carriage without a ticket, the former may sue for and recover the amount so paid above the established rate when a ticket is purchased; and if, upon his refusal to pay it, he be ejected, when he is ready and offers to pay his fare at such established rate, his expulsion will be illegal, and he may recover damages for the trespass.³⁴

33. *Porter v. The Railroad*, 34 Barb. 353; *De Laurans v. The Railroad*, 15 Minn. 49; *St. Louis, etc., R. R. v. Myrtle*, 51 Ind. 566; *Chicago, etc., R. R. v. Parks*, 18 Ill. 460; *St. Louis, etc., R. R. v. Dalby*, 19 *id.* 353; *Chicago, etc., R. R. v. Flagg*, 43 Ill. 364; *Nellis v. The Railroad*, 30 N. Y. 505; *Ill. Central R. R. v. Johnson*, 67 Ill. 312; *Same v. Cunningham*, *id.* 316; *Poole v. Railroad Co.*, 16 Oreg. 261; *Missouri Pac. Ry. Co. v. McClanahan*, 66 Tex. 530; *Southern, etc., Ry. Co. v. Hinsdale*, 38 Kan. 507; *Brown v. Railroad Co.*, 38 Kan. 634; *State v. Hungerford*, 39 Minn. 6; *Everett v. Railway Co.*, 69 Iowa, 15; *White v. Railway Co.*, 26 W. Va. 800; *Hall v. Railway Co.*, 25 S. C. 564; *Phillips v. Railway Co.*, 114 Ga. 284, 40 S. E. Rep. 268; *Cross v. Railway Co.*, 56 Mo. App. 664; *Railroad Co. v. Dickerson*, 4 Kan. App. 345, 45 Pac. Rep. 975.

See, under Texas statute, *Eddy*

v. Rider, 79 Tex. 53, 15 S. W. Rep. 113; *Fordyce v. Manuel*, 82 Tex. 527, 18 S. W. Rep. 657; *Railway Co. v. Sparger* (Tex. Civ. App.), 39 S. W. Rep. 1001.

The higher rate cannot lawfully be demanded if the agent informs a passenger that he is out of tickets and the passenger therefore boards the train without one. *Ammons v. Railway*, 138 N. Car. 555, 51 S. E. Rep. 127.

One who has been transported upon a train from one station to another, without producing a ticket or tendering the proper train fare, cannot claim the right to resume his journey on that train without making a proper settlement for the ride he has actually been permitted to take. *Coyle v. Railroad Co.*, 112 Ga. 121, 37 S. E. Rep. 163.

34. *Forsee v. Railroad Co.*, 63 Miss. 66; *Jefferson, etc., R. R. v. Rogers*, 28 Ind. 1; *Chase v. The Railroad*, 26 N. Y. 523; *Crocker v.*

The fact that the ejection in such cases occurs on Sunday does not affect the passenger's right to recover. While the right to ride upon the train has its foundation in the carrier's implied agreement to carry the passenger, the action is not for the breach of such contract, but for the violation of a personal right assured by the law.³⁵

Sec. 1034. Same subject—Waiver of right to demand higher fare when paid on train.—When the passenger tenders in good faith on the train the ticket fare as full fare to his place of destination, and the conductor takes it and retains it, the conductor thereby waives the right to require the passenger to still pay the difference between the ticket and train fare, provided that, under the circumstances attending the tender, receipt, and retention of the money, the passenger is justified in the belief that it was accepted in full for his fare to the place of destination. Thus if the conductor receives and retains it, without demanding more, till the train has passed the place at which he must exercise or abandon the right to eject the passenger for non-payment, the latter would have the right to assume that the amount paid was satisfactory. But the passenger cannot be justified in believing that the conductor has waived the right to demand train fare if the conductor, after he has once accepted ticket fare, demands of the passenger within a reasonable time, or before the train has passed the place where he must exercise or abandon the right to eject the passenger, the difference between such fares; and if he refuses, on such demand, to pay the difference he may be ejected from the train.³⁶

The Railway Co., 24 Conn. 249; St. Louis, etc., R. R. v. Myrtle, 51 Ind. 566; Porter v. The Railroad, 34 Barb. 353; Central R. & B. Co. v. Strickland, 90 Ga. 562, 16 S. E. Rep. 352; Phillips v. Railway Co., 114 Ga. 284, 40 S. E. Rep. 268; Railroad Co. v. Christison, 39 Ill. App. 495; Railroad Co. v. Graham, 3 Ind. App. 28, 29 N. E. Rep. 170,

50 Am. St. Rep. 256; Railway Co. v. Becketts, 11 Ind. App. 547, 39 N. E. Rep. 429; Railway Co. v. Cloes, 5 Ind. App. 444, 32 N. E. Rep. 588; Finch v. Railroad Co., 47 Minn. 36, 49 N. W. Rep. 329.

35. Chicago, etc., Railroad Co. v. Graham, 3 Ind. App. 28, 50 Am. St. Rep. 256, 29 N. E. Rep. 170.

36. Wardwell v. Railway Co., 46

Sec. 1035. Same subject—Carrier may abandon custom to sell tickets at reduced rates.—The mere fact that a railroad company has been accustomed, on a given day in each week, to sell round trip tickets between two stations along its line of road at a rate of fare below the maximum rate fixed by law does not entitle a person, who fails to procure such a ticket by reason of the fact that the agent is absent and the ticket office is closed, to be carried the round trip between such stations upon a tender to the conductor of the fare which the company has been in the past accustomed to charge. The closing of the ticket office is *prima facie* evidence that the company intends to abandon its custom which it has the right to do, and, in the absence of facts showing that such was not its intention, such custom cannot be relied on to constitute a contract of carriage at the reduced rate which the company was formerly in the habit of charging.³⁷

Sec. 1036. (§ 572.) Same subject—Ticket must be produced when called for—Lost, mislaid or forgotten tickets.—A regulation by which passengers are required to show their tickets to the conductor of the train whenever called upon to do so, and making it the duty of such conductor to remove from the train all passengers who refuse to do so, or to pay their fare, has also been held to be reasonable and proper, being necessary to prevent impositions upon the carrier by making one ticket serve as a passport for more than one passenger. And it will not matter that the conductor may know that the passenger has paid for a ticket, or that he has already seen it, or that it has been shown to him more than once, or that the passenger may offer to prove that he has it. He must show it; otherwise the conductor will be justified in expelling him in obedience to the regulation.³⁸ And when a regulation

Minn. 514, 49 N. W. Rep. 206, Ga. 496, 34 S. E. Rep. 127, 46 L. 24 Am. St. Rep. 246, 13 L. R. A. R. A. 502.
596; Railway Co. v. Joplin, 21 Ky. 38. Hibbard v. The Railroad, 15
L. R. 1380, 55 S. W. Rep. 206. N. Y. 455; Beebe v. Ayres, 28
37. Johnson v. Railroad Co., 108 Barb. 275; Stephen v. Smith, 29

of this kind exists, if the passenger should be so unfortunate as to lose his ticket, he may be required to pay his fare again.³⁹ But if it be lost or mislaid, and there is a reasonable ground for expecting that it may be found during the journey, a reasonable time must be given to find it,⁴⁰ but if he fails to find it within a reasonable time and refuses to pay his fare he may be ejected.⁴¹ And so if he has been so forgetful as to leave his monthly or commutation ticket at home, although it may be well known to the conductor of the train that he is possessed of such a ticket, from his customary use of it in going and re-

Vt. 160; *Chicago, etc., Ry. Co. v. Herring*, 57 Ill. 59; *Ripley v. The Railroad*, 31 N. J. Law, 388; *Nutter v. Railway Co.*, 25 Ky. L. R. 1700, 78 S. W. Rep. 470; *White v. Railroad Co.*, 107 Mich. 681, 65 N. W. Rep. 521; *Rogers v. Railroad Co.*, 57 N. J. Law, 703, 34 Atl. Rep. 11; *Railroad Co. v. Scott* (Tex. Civ. App.), 79 S. W. Rep. 642.

39. *Standish v. The S. S. Co.*, 111 Mass. 512; *Jerome v. Smith et al.*, 48 Vt. 230; *Crawford v. Railroad Co.*, 26 Ohio St. 580; *Atwater v. Railroad Co.*, 48 N. J. L. 55; *International, etc., R. Co. v. Wilkes*, 68 Tex. 617; *Cresson v. Railroad Co.*, 11 Phila. 597; *Cooper v. Railway Co.*, L. R. 4 Exch. Div. 88; *Railway Co. v. Daniels*, 90 Ill. App. 154; *Railway Co. v. Joplin*, 21 Ky. L. R. 1380, 55 S. W. Rep. 206; *Price v. Railroad Co.*, 46 W. Va. 538, 33 S. E. Rep. 255, citing *Hutch. on Carr.*

A ticket agent who tells a passenger who has lost his ticket that it will be all right and that he can ride without it, is not, when so speaking, acting within the apparent scope of his authority, and his statements will not be binding

on the carrier. *Railway Co. v. Smith* (Tex. Civ. App.), 84 S. W. Rep. 852.

40. *Maples v. Railroad Co.*, 38 Conn. 557; *International, etc., R. Co. v. Wilkes*, 68 Tex. 617; *Knowles v. Railroad Co.*, 102 N. C. 59.

Where a passenger, who was subject to chronic drowsiness, fell asleep before his ticket had been called for and the conductor expelled him from the train, the passenger not waking until he was partially out of the car, it was held that the conductor should have received the ticket when proffered by the passenger as soon as he realized the situation. *Ferguson v. Railroad Co.*, 98 Mich. 533, 57 N. W. Rep. 801.

41. *Louisville, etc., R. Co. v. Maybin*, 66 Miss. 83; *Railway Co. v. Smith* (Tex. Civ. App.), 84 S. W. Rep. 852.

The time occupied by a passenger train in running from one station to another is sufficient to allow a passenger, using ordinary diligence, to find a lost ticket. *Railroad Co. v. Willard*, 31 Ill. App. 435.

A passenger may be expelled on

turning upon the road, his fare may be demanded, and he may be ejected if he refuses to pay it.⁴²

Sec. 1037. Same subject—Rebate or train tickets given on payment of cash fare must be produced when called for.—If a rebate or train ticket is given on payment of a cash fare, it is the duty of the passenger to produce it when asked by the conductor for an inspection of it, or to explain to the conductor his inability to do so. But if the conductor does not ask for its production and insists on the payment of a second fare, and the passenger does not think of producing it, the company will be liable in damages if the passenger is ejected for the non-payment of the second fare. If the conductor does ask for its production and the passenger refuses to comply with his reasonable request, the passenger may be compelled to pay a second fare or be ejected from the train.⁴³

Sec. 1038. (§ 573.) Same subject—Right to require surrender of ticket.—So a regulation that, when the ticket of the passenger is demanded in exchange for a check, it shall be surrendered by the passenger, is considered reasonable; and if the passenger refuse to surrender his ticket when thus de-

his failure to produce a ticket entitling him to ride or to pay his fare, and when he fails to produce a proper ticket the conductor cannot be required to hear evidence or investigate the *bona fides* of the passenger's excuse for its non-delivery, nor is he obliged to wait until the next station is reached and to telegraph to the selling agent in order to verify the correctness of the plaintiff's statement or to determine the character of the ticket sold. *Harp v. Railway Co.*, 119 Ga. 927, 47 S. E. Rep. 206, 100 Am. St. Rep. 212.

The conductor is not bound to search a passenger's pocket to find the ticket which the passenger in-

sists he has, but if he does undertake to search for it, he should do so in good faith. *Louisville, etc., R. Co. v. Fleming*, 14 Lea, 128.

42. *Downs v. Railroad Co.*, 36 Conn. 287.

Where a passenger has left his ticket at home he cannot insist on riding by depositing the amount of the usual fare with the conductor on condition that it shall be returned to him when he gets his ticket. *Knowles v. Railroad Co.*, 102 N. C. 59. See also, *Atwater v. Railroad Co.*, 48 N. J. L. 55.

43. *Railway Co. v. Goben*, 15 Ind. App. 123, 43 N. E. Rep. 890 (denying rehearing on, 42 N. E. Rep. 1116).

manded, he may be removed from the train.⁴⁴ But the passenger cannot be required to give up his ticket unless a check, or some other evidence of the fact that he has paid for his passage, be given to him in its stead.⁴⁵ And if he has done so, and if the same conductor afterwards demands a ticket or fare of him again, and ejects him for a failure to produce either,⁴⁶ or if another conductor of the company, taking the place of the one to whom he has given his ticket, and not informed of the fact, demand it again of him, and put him off after being told by the passenger of its delivery to the conductor previously in charge of the train, such expulsion will be unlawful, and he may sue and recover damages from the company.⁴⁷

Sec. 1039. (§ 574.) Same subject.—While the second conductor in such a case acts in the performance of his duty, as between himself and the company, in putting off the passenger who cannot show his ticket, that will not excuse the wrongful act of the first conductor in taking from the passenger his ticket without giving him in return some evidence of his right to travel upon the train, and the company will be liable for compensatory but not for punitive damages.⁴⁸ And so where

44. *Havens v. The Railroad*, 28 Conn. 69; *The Northern, etc., R. R. v. Page*, 22 Barb. 130; *White v. Railroad Co.*, 133 Ind. 480, 33 N. E. Rep. 273, citing *Hutch. on Carr.*

The above rule is applicable to a regulation that commutation tickets be surrendered on the last trip. *Rogers v. Railroad Co.*, 57 N. J. Law, 703, 34 Atl. Rep. 11.

45. *State v. Thompson*, 20 N. H. 250.

46. *Indianapolis, etc., Ry. Co. v. Howerton*, 127 Ind. 236.

47. *Pittsburgh, etc., R. R. v. Hennigh*, 39 Ind. 509; *Palmer v. The Railroad*, 3 Rich. S. C. (N. S.) 380; *Railway Co. v. King*, 88 Ga. 443, 14 S. E. Rep. 708.

48. *Townsend v. The Railroad*,

56 N. Y. 295; *Sloane v. Railway Co.*, 111 Cal. 668, 44 Pac. Rep. 320, 32 L. R. A. 193.

So where a passenger who must change trains and is unable to secure a ticket at the station pays his fare on the train to the first conductor who neglects to give him a ticket, the railroad company will be liable if the conductor of the second train, with knowledge of that fact, ejects the passenger from his train. Whether the second conductor had knowledge of the payment of fare to the first conductor is a question of fact for the jury. *Homiston v. Railroad Co.*, 22 N. J. Supp. 738, 3 Misc. Rep. 342.

the passenger had paid for and had obtained, as he supposed, a ticket which entitled him to his passage to his destination and which he surrendered to the conductor without receiving a check, but which, by a mistake of the company's agent from whom it was purchased, only entitled him, as the conductor asserted, to be carried to a point short of such destination, and after he had been carried beyond the place designated in the ticket, and before reaching that to which he had really contracted and paid to be carried, he was ejected because the ticket did not entitle him to be carried further, it was held that the conductor had performed his duty, and that as between him and the passenger the ticket, in accordance with the rule which will be hereafter noticed, was conclusive, but that the company was liable to him for a breach of its contract to carry occasioned by the mistake of its ticket agent.⁴⁹

Sec. 1040. Same subject—Torn or mutilated tickets.—"It is true that where the passenger has no ticket, or has a ticket so imperfect that it furnishes no sufficient evidence of being genuine, and the conductor has nothing to determine the passenger's rights from except his explanations, he is not bound to take the same as true unless his failure to have a ticket or a perfect ticket was due to the company's fault, it being plain that such a rule would enable persons to avoid paying their fares; but if the passenger has a ticket which in fact is genuine and entitles him to be carried, but is somewhat soiled or changed in its general appearance, it is the duty of the conductor to hear any explanation the passenger may offer to make, and consider said explanations in connection with said ticket for the purpose of determining the rights of the passenger."⁵⁰ Thus a railroad company was held liable in damages

49. *Frederick v. The Railroad*, 37 Mich. 342. And see in support of these cases, *Bennett v. The Railroad*, 5 Hun, 599; *Downs v. The Railroad*, 36 Conn. 287; *Chicago, etc., R. R. v. Griffin*, 68 Ill. 499; *Pullman, etc., Co. v. Reed*,

75 *id.* 125; *Shelton v. The Railroad*, 29 Ohio St. 214.

50. *Railroad Co. v. Conley*, 6 Ind. App. 9, 32 N. E. Rep. 96.

If a railroad chooses to place its check number upon a part of the ticket where it is liable to be

where a conductor ejected a passenger on the ground that his ticket was not genuine. His ticket was in fact a genuine ticket, and so showed upon its face in all respects except the original color, which was blue, but had faded on account of being wet so that it was white or of a light color, and the general appearance of the ticket showed the effect of the water upon it.⁵¹

Sec. 1041. (§ 575.) In absence of contract, ticket presumed to be for continuous trip—Stop-over.—The performance of the contract for carriage evidenced by the ticket, it has been held, must be demanded by its holder as an entirety, when there is no express agreement upon the subject on the ticket or with the agent of the company with competent authority to make it. If, therefore, by its terms the ticket is for a passage from one point to another, when the journey has been once commenced it must be continued without intermission until the destination named in the ticket has been reached; and the pas-

torn off by conductors in detaching coupons, instead of placing such check numbers upon a part of the ticket where it could not be removed without destroying the contract expressed in the ticket, the railroad company should not be heard to say that the removal of the check number by the first conductor in tearing off a coupon destroyed the validity of the ticket. *Railway Co. v. Cope*, 36 Ill. App. 97.

To "mutilate" a railroad ticket within the reasonable meaning of a stipulation on its face that it shall not be good for passage if mutilated in any way, it must be deprived of some essential or material part; and such a ticket is valid, although torn in two pieces, when both pieces are presented to the conductor at the same time, and it is apparent that they are parts of the same ticket, that to-

gether they form the entire ticket, and that no fraud has been perpetrated upon the railroad company. *Young v. Railway Co.*, 120 Ga. 25, 47 S. E. Rep. 556, 65 L. R. A. 436, 102 Am. St. Rep. 68.

In *Henly v. Railroad Co.*, 59 N. Y. Supp. 857, 28 Misc. 499, *affirming* 57 N. Y. Supp. 396, 27 Misc. 811, the holder of a commutation ticket so mutilated it for his own convenience that the places for fares were all cancelled before they had been used. He did not apply to the proper officers of the company for relief, but attempted to take passage on it, and persisted in his attempt to such an extent that he obstructed the passageways. He was removed by a policeman, and it was held that the company was not liable as for an assault.

51. *Railroad Co. v. Conley*, 6 Ind. App. 9, 32 N. E. Rep. 96.

senger cannot claim the right to stop at any intermediate place and continue his trip upon a subsequent train of the same company with the same ticket,⁵² unless the carrier has failed to carry him with that reasonable dispatch which, on account of his reciprocal rights⁵³ against the carrier, he had a right to

52. *Wilsey v. Railroad Co.*, 83 Ky. 511; *Wyman v. Railroad Co.*, 34 Minn. 210; *Stone v. Railway Co.*, 47 Iowa, 82; *Drew v. Railroad Co.*, 51 Cal. 425; *Oil Creek Ry. v. Clark*, 72 Penn. St. 231; *Cleveland, etc., R. R. v. Bartram*, 11 Ohio St. 457; *Hatten v. Railroad Co.*, 39 Ohio St. 375; *Churchill v. The Railroad*, 67 Ill. 390; *McClure v. The Railroad*, 34 Md. 552; *Cheney v. The Railroad*, 11 Met. 121; *State v. Overton*, 4 Zab. (24 N. J. Law), 435; *Pennsylvania R. Co. v. Parry*, 55 N. J. Law, 551, 27 Atl. Rep. 914, 39 Am. St. Rep. 654, 22 L. R. A. 251; *Ashton v. Railway Co.*, (1904) 2 K. B. 313, 73 L. J. K. B. 701; *Coombs v. The Queen (Can.)*, 26 S. C. R. 13, *affirming* 4 Ex. C. R. 321.

In California, the rule in the text is changed by statute. *Railway Co. v. Robinson*, 132 Cal. 408, 64 Pac. Rep. 572; *Robinson v. Railroad Co.*, 105 Cal. 526, 541, 38 Pac. Rep. 94, 108, 722, 28 L. R. A. 773.

In *McClure v. Railroad Co.*, 34 Md. 532, the passenger had a through ticket, which he surrendered and received from the conductor a conductor's check, dated that day and stating that it was good for that day and train only. Wishing to stop over at a certain station, he went into the office and asked a person whom he saw standing in the ticket office whether he could stop over on that check, and was told that he

could; that the check was good until taken up. He stopped, and afterwards attempted to resume his journey on the check, which was refused. *Held*, that he was not entitled to do so, and that, even if the person in the ticket office (whose identity was not shown) were the ticket agent, he would have no implied authority to waive the rule of a continuous passage. To the same effect is *Cheney v. Railroad Co.*, *supra*.

The conductor of one train cannot confer authority which must be recognized by the conductor of another train and which will entitle a passenger to stop over whose ticket does not entitle him to that right. *Petrie v. Railroad Co.*, 42 N. J. L. 449.

To the same effect see, *Railroad Co. v. Best*, 93 Tex. 344, 55 S. W. Rep. 315.

As to the meaning of a clause in a ticket that it shall be good only for continuous trips "between" designated stations, see *Railroad Co. v. Clarke*, 97 Ga. 706, 25 S. E. Rep. 368.

53. In *Railroad Co. v. Klyman*, 108 Tenn. 304, 67 S. W. Rep. 472, 91 Am. St. Rep. 755, 56 L. R. A. 769, citing *Hutch. on Carr.*, the court said: "The contract operated on both alike. It gave the passenger no more power to break his journey into parts against the company's will than it gave the company to do the same thing against his will. It gave neither the right

demand.⁵⁴ *A fortiori* is this true where the ticket expressly

of severance and piecemeal performance without the consent of the other, and no consent is shown or claimed. The purchase of a full rate, through ticket from Russelville to Nashville, if made by plaintiff, entitled him, under the authority of Railroad Co. v. Turner, 100 Tenn. 214, 77 S. W. 223, to elect when he would begin his journey, but it did not entitle him under that or any other authority, of which we are aware, to subdivide his journey at will, or, when started, to go otherwise than continuously from initial point to ultimate destination. The law implies the right of an election between times for embarkation from the very sale of such a ticket, and it likewise, for a similar reason, implies the duty of a continuous passage from the very fact of its commencement."

54. Wilsey v. Railroad Co., 83 Ky. 511; Miller v. Railroad Co., 85 N. Y. Supp. 883, 89 App. Div. 457.

In Wilsey v. Railroad Co., *supra*, appellant, having purchased a ticket, was a passenger upon defendant's train. About dark the train was stopped by a wreck ahead of it. Being told by the train officials that the train would be detained several hours, perhaps all night, and that they could not say when it would continue, appellant, who was sick, informed the conductor of the fact and asked for a stop-over check, which was refused. Appellant then went to a hotel, remained all night, and next morning boarded another train to continue his journey, having with him the check given him by the other conductor. The sec-

ond conductor refused to recognize this check or appellant's right to ride and ejected him, and this action was for the ejection. The court, while recognizing the rule in regard to a continuous trip, held that, the company having failed to carry him with reasonable dispatch, he had the right to leave the train and continue his journey on another.

After stating the general rule, the court proceeds to say: "But, on the other hand, the company owes duties to the passenger. By the contract, it undertakes to make the transit covered by the ticket within a reasonable time; and it is only when it is doing so in a reasonable manner that the passenger has no right to leave the train, and take passage upon another under the original contract. To hold that he cannot under any circumstances whatever make a re-election of trains would give to the carrier an unfair advantage in the performance of the contract, and would be an unjust discrimination against the public.

"Reason dictates that for good cause a passenger may leave a train and have his baggage delivered and embark upon another. The peculiar circumstances of this case say so. Here is a sick passenger upon a train, which about dark is stopped upon the road by a wreck ahead of it and upon its own road. It matters not whether the wreck resulted from the company's neglect or not. It exists and impedes the further passage of the train, and prevents the company from complying with the contract as it has undertaken to

stipulates that the journey shall be continuous.⁵⁵ Nor can such a ticket be tendered for fare where the passenger has voluntarily taken a train which he knows does not go as far as his destination.⁵⁶ Nor, under such a ticket, can a passenger who knows that the train will not stop at the point of his destination insist on stopping at an earlier point and having a "stop-over" check provided him upon which to afterward complete his journey.⁵⁷

do within a reasonable time and in a reasonable manner. The passenger is informed by the train officials that the delay will last several hours; perhaps all night; that they cannot tell when it will go on, and they fix no time when he must be present and ready to proceed. Is he in such a case required to remain upon the train all night or for an unknown time? We think not. Suppose the particular train upon which he has embarked was by some accident disabled from proceeding at all; would he not be entitled to take a later one and proceed to his destination without the payment of additional fare? The delay in question could not be considered an ordinary one, and that hence the passengers must submit to it. The appellee was not bound to wait all night in the train, or from 7 o'clock in the evening until 4 o'clock the next morning for the train to proceed. The company itself having first failed in the performance of the contract within a reasonable time, reason, a fair interpretation of the contract, as well as public policy, require a different rule in such cases from the general one. It is perhaps impossible to lay down one which will apply to all cases, as

each one must necessarily depend upon its own peculiar circumstances; but if, from accident or misfortune or other cause, and without the passenger's fault, his transit be interrupted, and it be more than an ordinary delay, then he may resume his journey afterwards upon a different train, and without the repayment of fare."

55. *Petrie v. Railroad Co.*, 42 N. J. L. 449; *Walker v. Railway Co.*, 15 Mo. App. 333.

56. *Johnson v. Railroad Co.*, 63 Md. 106.

Where a person's ticket entitles him only to a continuous passage, he cannot, under his ticket, voluntarily take a train which runs only to an intermediate station and there take passage on a subsequent train running to his destination and claim the right to be carried on such train under his original ticket. And this follows even though such subsequent train is the one he should have taken in the first instance. By voluntarily breaking his journey, he thereby forfeits his right to enter the subsequent train. *Railway Co. v. Henry*, 84 Tex. 678, 19 S. W. Rep. 870, 16 L. R. A. 318.

57. *Trotlinger v. Railroad Co.*, 11 Lea, 533.

Sec. 1042. Same subject—Through passenger cannot claim the advantage of local excursion or competitive rates between intermediate points.—When the through fare from the place of departure to the passenger's destination is greater than the sum of the local fare between the place of departure and an intermediate point plus the local fare between that intermediate point and the passenger's destination, owing to the existence of a competitive rate between the place of departure or destination and the intermediate point, a passenger cannot stay on the train and tender the competitive local fare plus the remaining local fare for his through carriage, instead of the existing through rate. By remaining on the train, the passenger shows an intention to make the contract one of through carriage, and he must pay the through rate.⁵⁸ And it would seem that the same rule is applicable to the use of excursion tickets.⁵⁹

Sec. 1043. Same subject—Limitations as to time within which ticket is good for use.—A ticket issued without limitation is good for use at any time within the period prescribed by the statute of limitations for similar contracts.¹ But the carrier may lawfully limit the time within which the ticket shall be used,² although such a limitation will be construed

^{58.} *Railway Co. v. Hinchcliffe*, (1903) 2 K. B. 32, 88 Law T. 800, 72 L. J. K. B. 530, 51 Wkly. Rep. 556, 19 Times L. R. 430.

^{59.} *Great Northern Railway v. Palmer*, (1895) 1 Q. B. 862, 64 L. J. Q. B. 316.

See also, *Great Northern Railway v. Windes*, (1892) 2 Q. B. 595, 61 L. J. Q. B. 608.

^{1.} *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. Rep. 841, 68 Am. St. Rep. 146, citing *Hutch. on Carr.*; *Casiano v. Railway Co.* (Tex. Civ. App.), 82 S. W. Rep. 806. The state legislature may enact that limitations to the contrary shall

not be valid. *Dryden v. Railroad Co.*, 60 Me. 512.

^{2.} *Boice v. The Railroad*, 61 Barb. 611; *Shedd v. The Railroad*, 40 Vt. 88; *Cheney v. The Railroad*, 11 Met. 121; *Hill v. Railroad Co.*, 63 N. Y. 101; *Elmore v. Sands*, 54 N. Y. 512; *Rawitzky v. Railroad Co.*, 40 La. Ann. 47; *Barker v. Coffin*, 31 Barb. 556; *Wentz v. Railway Co.*, 3 Hun, 241; *Railroad Co. v. Proctor*, 1 Allen, 267; *Hanlon v. Railroad Co.*, 109 Iowa, 136, 80 N. W. Rep. 223; *Trezona v. Railway Co.*, 107 Iowa, 22, 77 N. W. Rep. 486, 43 L. R. A. 136; *Railroad Co. v. Marlett*, 75 Miss.

most strongly against the carrier.³ In order to be effective, however, limitations as to time of use must be made known to the public in such a way and by such means as, in the special case, may be necessary and best adapted to serve the convenience and purpose of the passenger as well as of the carrier. As to what notice of limitations is required or is sufficient in order to reach and affect the public, the authorities are by no means agreed, the difference of opinion arising from the fact that some authorities regard such limitations as in the nature of regulations adopted by the carrier for the better management of its business, while others regard them as matters of contract between the passenger and carrier. The latter seems to be the better rule and, under it, a person who purchases a general ticket, and pays the usual price therefor, is entitled to one passage, unlimited as to time, upon any train which, under the proper and usual schedules of the road, stops at the point of the passenger's destination. If a ticket limited or conditional is sold to a passenger, it can only be done upon an express agreement with him, either oral or in writing, and either based upon a consideration, or with the alternative presented to the passenger of a full and unlimited ticket. The mere stamping or printing of a limitation or condition upon the face or back of a ticket, and the acceptance of such ticket by the passenger, without more, are not sufficient to bind him to such condition or limitation, in the absence of actual notice to him of such condition or limitation and his assent thereto when he purchases his ticket. Nor will the posting of notices in the waiting rooms, ticket offices, and on the cars affect purchasers with notice in such cases. Passengers have but little time or opportunity to read such placards; and, it would impose quite a serious burden upon travel to hold that the pub-

956, 23 So. Rep. 583; *Malott v.* 548; *Maxson v. Railroad Co.*, 97 Woods, 109 Ill. App. 512; *Schubach* N. Y. Supp. 962.
v. McDonald, 179 Mo. 163, 78 S. 3. *Railway Co. v. Kinsley*, 27 W. Rep. 1020, 65 L. R. A. 136, 101 Ind. App. 135, 60 N. E. Rep. 169, Am. St. Rep. 452; *Demilly v. Railroad Co.* 91 Tex. 215, 42 S. W. Rep. 87 Am. St. Rep. 245.

lic must read all these notices thus posted before taking passage on a train upon which they are willing to and do pay full fare.⁴ This rule by no means prevents a carrier from selling special tickets for special trains with limitations and conditions, such as excursion, round-trip, commutation and mileage tickets, when the conditions and limitations are known to the purchaser and assented to by him orally or in writing, and he has paid for such ticket less than the usual fare. When tickets

4. *Railroad Co. v. Turner*, 100 Tenn. 213, 47 S. W. Rep. 223, 43 L. R. A. 140; *Norman v. Railway Co.*, 65 S. Car. 517, 44 S. E. Rep. 83, 95 Am. St. Rep. 809; *Dagnall v. Railway Co.*, 69 S. Car. 110, 43 S. E. Rep. 97; *Railroad Co. v. Gaines*, 99 Ky. 411, 36 S. W. Rep. 174, 59 Am. St. Rep. 465; *Railroad Co. v. Baldoni*, 115 Ga. 1013, 42 S. E. Rep. 364; *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. Rep. 841, 68 Am. St. Rep. 146.

Actual knowledge is sufficient. *McGhee v. Drisdale*, 111 Ala. 597, 20 So. Rep. 391.

"A passenger has a right to be conveyed in the cars of a railroad company without making any special contract for transportation. Upon payment of the usual fare, the company is bound to convey him, and is under all the obligations imposed by law on common carriers, so far as they relate to him as a passenger. It is competent to vary these obligations by a special agreement, on valuable consideration, between the passenger and the company. But if the passenger chooses to do so, he may stand on his legal rights, and elect to be carried to his destination without making any special contract. The mere purchase of a ticket does not constitute a con-

tract. Before the ordinary liability of the railroad company can be varied, there must be a consent of the passenger, founded on valuable consideration. The ticket ordinarily is only a token, showing that the passenger has paid his fare. But where the ticket is sold at less than the usual rates, on the condition that it shall not be used after a limited time, if the passenger accepts and uses the ticket, he makes a contract with the company according to the terms stated, and the reduction in the fare is the consideration for his contract. It is true he pays his fare before he receives the ticket, but if he has been misled or misinformed, by the seller of the ticket, as to its terms, he has a right to return the ticket and receive back his money. The railroad company agrees to carry him at the reduced rate, upon the conditions stated on the face of his ticket; if he agrees to those terms, the contract is consummated; but he cannot take advantage of the reduction of the rate and reject the terms on which alone the reduction was made. *Pennington v. Railroad Co.*, 62 Md. 95.

See also, *Pennsylvania Co. v. Spicker*, 105 Pa. St. 142.

are sold at reduced rates, the purchaser should, in consideration of such reduced fare or greater privileges, expect and look for some conditions, limitations, and terms different from those attaching to tickets generally, and be on his guard to become informed of them.⁵ But there is no such obligation on the ordinary passenger who pays the usual or full fare and asks for no reduced rates or special privileges; and he has a right to expect an unlimited ticket.

Some courts, however, regard limitations, as to the time of use of a ticket, as regulations of the carrier and not as matters of contract between the carrier and the passenger. If that view be correct, it necessarily follows that the passenger must take notice of such a regulation as he must do of all other reasonable rules and regulations of the carrier. Notice of a time limitation on the ticket would therefore be sufficient,⁶ and the mere posting of a notice that tickets are limited, without printing on the ticket or other notification, has been held to be sufficient to bring to the passenger knowledge of the limitation so as to make it binding on him.⁷ This view seems hardly tenable in the light of modern authorities.

If the more modern rule be correct, and a time limitation is a matter of contract and not of mere regulation by the carrier, a distinction should be noted between tickets which are mere tokens or checks not purporting to be contracts between the carrier and the purchaser, but which only indicate the route over which the passenger is to be carried, and contract tickets. In the first class of tickets, the purchaser is not presumed to look for limitations. In contract tickets which no

5. See cases cited in preceding note, and also *Elliott v. Southern Pacific Co.*, 145 Cal. 441, 79 Pac. Rep. 420, 68 L. R. A. 393; *Railway Co. v. Ricks*, 109 Ga. 339, 34 S. E. Rep. 570; *Grogan v. Railway Co.*, 39 W. Va. 415, 19 S. E. Rep. 563, citing *Hutch. on Carr.*; *Railway Co. v. Howard*, 111 Ga. 842, 36 S. E. Rep. 213; *Churchill v. Railroad*

Co., 67 Ill. 390; *Maxson v. Railroad Co.*, 97 N. Y. Supp. 962.

6. *Coburn v. Railroad Co.*, 105 La. 398, 29 So. Rep. 882, 83 Am. St. Rep. 242; *Freeman v. Railway Co.*, — Kan. —, 80 Pac. Rep. 592.

7. *Johnson v. Railroad Co.*, 46 N. H. 213, 88 Am. Dec. 199.

person who could read could glance at without seeing that they purport to govern the relation of carrier and passenger in detail, the ordinary purchaser is presumed to look for such limitations. But even in the latter case, the limitations must be supported by an adequate consideration in the shape of a reduced rate, or otherwise.⁸

Sec. 1044. Same subject.—The chief use of a passenger ticket is to identify the holder as a person who has paid his fare or has otherwise complied with conditions entitling him to carriage, and this use of it is ordinarily made when the holder offers himself to be carried; hence, where nothing is expressed to the contrary, a stipulation purporting to limit the use of a ticket to a specified time is construed as fixing that time as the latest for commencing and not for completing the journey.⁹

It has also been held that when a railway passenger ticket contains a clause, "Continuous passage within one day of date of sale," and a certain date is stamped upon it, such date is presumptively the date of its sale, and if presented at a subsequent date, its holder is not entitled to have it accepted as valid. But if sold on another date than that stamped upon it, it is good from the date of sale and not from the date inserted in the ticket.¹⁰

8. Where the passenger purchases a ticket for transportation from one point to another over the road of a common carrier, and pays full or regular ordinary fare, the ticket is not intended as a contract itself, but as a mere token or evidence of a contract which the law creates and which lies behind the ticket. In such case the law makes the contract and regulates the reciprocal rights and duties of both carrier and passenger, and the ticket is a mere token that such contract

exists, and, under it, the passenger is entitled to be carried to and from the points named without regard to time limitations printed upon it. *Boling v. Railroad Co.*, — Mo. —, 88 S. W. Rep. 35. See also, *Walker v. Price*, 62 Kan. 327, 62 Pac. Rep. 1001, 84 Am. St. Rep. 392, citing *Hutch. on Carr.*

9. *Morningstar v. Railroad Co.*, 135 Ala. 251, 33 So. Rep. 156.

10. *Ellsworth v. Railway Co.*, 95 Iowa, 98, 63 N. W. 584, 29 L. R. A. 173.

Sec. 1045. Same subject.—So when a ticket is issued by a carrier not good for passage after a certain date, if the holder of the ticket commences his journey before midnight of the last day, he is entitled to complete the passage on the ticket although it cannot be so completed before the expiration of the time fixed in the contract, and the fact that a change of trains is necessary cannot affect the right of the passenger to complete the passage on the ticket.¹¹ Thus, a ticket sold on the 6th of the month, to be used within two days from its date, may be used at any time before midnight on the 8th.¹² When the day upon which the ticket expires is Sunday, upon which no trains are run, it will be good for use on Monday.¹³ Where, however, the time has expired before the passenger has had an opportunity to use his ticket, though through the negligence of the carrier, the passenger is not entitled to ride upon it, but should pursue his remedy against the carrier for the breach of the contract;¹⁴ but this is subject to the qualification that if the passenger started in time to make his passage within the time limited, he should not suffer if any casualty or

11. *Railway Co. v. Kinsley*, 27 Ind. App. 135, 60 N. E. Rep. 169, 87 Am. St. Rep. 245; *Railroad Co. v. Stephen*, 13 Ky. L. R. 687; *Railroad Co. v. Powell*, 13 Tex. Civ. App. 212, 35 S. W. Rep. 841; *Rutherford v. Railway Co.*, 28 Tex. Civ. App. 625, 67 S. W. Rep. 161.

Good if passage begun before midnight of last day. *Evans v. Railway Co.*, 11 Mo. App. 463. Sufficient if trip begun before expiration. *Auerbach v. Railroad Co.*, 89 N. Y. 281; *Lundy v. Railroad Co.*, 66 Cal. 191.

12. *Georgia R. Co. v. Bigelow*, 68 Ga. 219.

13. *Little Rock, etc. R'y Co. v. Dean*, 43 Ark. 529.

14. *Pennsylvania Co. v. Hine*, 41

Ohio St. 276, citing *Shelton v. Railroad Co.*, 29 *Ohio St.* 214; *Townsend v. Railroad Co.*, 56 N. Y. 295; *Frederick v. Railroad Co.*, 37 Mich. 342; *Lake Shore, etc. R'y Co. v. Pierce*, 47 Mich. 277; *Railway Co. v. Watson*, 110 Ga. 681, 36 S. E. Rep. 209.

If the time has expired through the negligence of the carrier's agent in not punching the right date upon the ticket, and that fact is brought to the attention of the head office by the conductor who is instructed to honor the ticket, and the conductor of the next division refuses to honor the ticket and expels the passenger from the train, the railroad will be liable. *Johnson v. Railway Co.*, 46 Fed. 347.

incapacity in the initial or any connecting line made the journey impracticable within the limit.¹⁵

Sec. 1046. Same subject.—A time limitation as to the use of a ticket must be reasonable in view of all the facts and circumstances existing at the time the contract is entered into, and, if it be unreasonable, a passenger who avails himself of the first opportunity to complete his journey under the contract may do so, although the time stipulated therein has expired.¹⁶ But there is no principle of law which will authorize the passenger not to proceed under the original contract at all, but to seek to enforce a passage upon a subsequent and distinct journey commenced long after the time stipulated in the contract.¹⁷

15. *Morningstar v. Railroad Co.*, 135 Ala. 251, 33 So. Rep. 156; *Mitchell v. Railway Co.*, 77 Miss. 917, 27 So. Rep. 834; *Myers v. Railway Co.*, 64 S. Car. 514, 42 S. E. Rep. 598; *Railroad Co. v. Harris*, 81 Miss. 208, 32 So. Rep. 309, 59 L. R. A. 742, 95 Am. St. Rep. 466.

16. *Elliott v. Southern Pacific Co.*, 145 Cal. 441, 79 Pac. Rep. 420, 68 L. R. A. 393; *Railway Co. v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. Rep. 399; *Railway Co. v. Dennis*, 4 Tex. Civ. App. 90, 23 S. W. Rep. 400; *Railway Co. v. Wright*, 10 Tex. Civ. App. 179, 30 S. W. Rep. 294.

See also, *Marx v. Railroad Co.*, 112 La. 1085, 36 So. Rep. 862.

17. *Elliott v. Southern Pacific Co.*, *supra*.

Where a ticket is "good for one seat," it means a seat on the same train upon which the holder has once taken passage, and not upon another train or upon different stages of the same journey. *Dietrich v. The Railroad*, 71 Penn. St. 432.

But it has been held that "good for this trip only" relates to the time of using the ticket and not to its date, and that therefore the holder may retain the ticket and commence his journey on a subsequent day to its date, but that having once commenced it, it must be continuous, and if he stop over upon the route, he cannot afterwards proceed with the same ticket. *Pier v. Finch*, 24 Barb. 514.

And where the ticket was "good for twenty days," it was said that although the holder might defer using it until the time was about to expire, yet if he commenced his trip as soon as he obtained the ticket, he must continue it to the end without stopping, and that if he stopped over for another train, he would forfeit his right to go further with the same ticket, although the twenty days had not elapsed. *Hamilton v. The R. R.*, 51 N. Y. 100.

The law was thus stated by Lott, Ch. C., but the other judges declined to express their opinions upon the point, it being unnec-

Sec. 1047. Same subject.—A carrier may waive the limitation as to time by accepting and receiving the owner of the ticket as a passenger after the time limited in the ticket has expired.¹⁸ But the fact that one of two tickets, not used within the time limited, was received as good does not constitute a waiver as to the other.¹⁹

Sec. 1048. (§ 577.) Rule different in case of coupon tickets.—A well-recognized distinction exists between the ordinary ticket of the carrier, which binds it to carry from point to point upon its own road, and tickets which entitle the holder not only to passage over the line of the company issuing them, but also over other connecting lines over which it is necessary for him to pass in order to reach his destination, and which are issued in what is called the coupon form and are denominated coupon tickets. When the carriage contemplated is confined to the line which issues the ticket, it is a contract solely with that line to carry the holder according to its terms, and when the transportation is once begun, both parties are held to a continuous performance until it is completed unless otherwise agreed.²⁰

Sec. 1049. (§ 578.) Coupon ticket does not usually import contract of through carriage.—But when the passenger has received from the carrier a number of such coupon tickets, one for his passage over the route of the first and others as passports over the lines of succeeding carriers, the rule applicable to common carriers of goods, by which a through bill of lading and the payment of through freight would make the first or contracting carrier responsible for their safe transportation throughout their whole route to destination, does not apply,

essary to do so, there being error upon another point, upon which the judgment below was reversed.

A statute giving longer life to the ticket than that expressed upon its face will not be given an extraterritorial effect. *Carpenter v. Railway Co.*, 72 Me. 388; *Bos-*

ton, etc. R. Co. v. Trafton, 151 Mass. 229.

18. *Pennington v. Railroad Co.*, 69 Ill. App. 628.

19. *Hanlon v. Railroad Co.*, 109 Iowa, 136, 80 N. W. Rep. 223.

20. *Railroad Co. v. Klyman*, 108 Tenn. 304, 67 S. W. Rep. 472, 56

and such tickets are held not to import a contract on the part of the first carrier, from whom they are received, to be responsible for the carriage of the passenger beyond its own line. In such cases the first carrier is considered rather in the light of an agent for the succeeding carriers than as undertaking for their faithful discharge of their duty, and the coupons as in the nature of separate tickets on behalf of the successive carriers, and binding upon them in the same manner as if issued by themselves.²¹ And the same rule of construction is applied

L. R. A. 769, 91 Am. St. Rep. 755, citing *Hutch. on Carr.*

21. *Young v. Railroad Co.*, 115 Penn. St. 112; *Auerbach v. Railroad Co.*, 89 N. Y. 281; *Kerrigan v. Railroad Co.*, 81 Cal. 248; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; *Hartan v. Railroad Co.*, 114 Mass. 44; *Pennsylvania R. Co. v. Scharzenberger*, 45 Penn. St. 208; *Atchison, etc. R. Co. v. Roach*, 35 Kans. 740; *Baltimore, etc. R. Co. v. Campbell*, 36 Ohio St. 647; *Railroad Co. v. Foster*, 134 Ala. 244, 32 So. Rep. 773, 92 Am. St. Rep. 25, citing *Hutch. on Carr.*; *Spencer v. Lovejoy*, 96 Ga. 657, 23 S. E. Rep. 836, 51 Am. St. Rep. 152, citing *Hutch. on Carr.*; *Railroad Co. v. Mulford*, 162 Ill. 522, 44 N. E. Rep. 861, 35 L. R. A. 599, reversing 59 Ill. App. 479; *St. Clair v. Railroad Co.*, 77 Miss. 789, 28 So. Rep. 957; *Koenke v. Railroad Co.*, 57 N. Y. Supp. 325, 39 App. Div. 457; *Railroad Co. v. Loftis*, 72 Ohio St. 288, 74 N. E. Rep. 179, 182, 106 Am. St. Rep. 597; *Nichols v. Railroad Co.*, 23 Ore. 123, 31 Pac. Rep. 296, 18 L. R. A. 55, 37 Am. St. Rep. 664, citing *Hutch. on Carr.*; *Moore v. Railway Co.*, 18 Tex. Civ. App. 561, 45 S. W. Rep. 609; *Railway Co. v. Looney*, 85 Tex. 158, 19 S. W.

1039, 34 Am. St. Rep. 787, 16 L. R. A. 471.

The fact that a passenger knows what a coupon ticket is, and intends to purchase a ticket taking him over the defendant's line and another connecting line, warrants the inference of notice to him of a statement at the head of the ticket that the company selling the ticket acts as "agent" and that it does not intend to become responsible beyond its own line. *Talcott v. Railroad Co.*, 159 N. Y. 461, 54 N. E. Rep. 1, reversing in part, affirming in part, 35 N. Y. Supp. 574, 89 Hun. 492; s. c. 66 Hun. 456, 21 N. Y. Supp. 318.

In *Dresser v. Railway Co.*, 116 Fed. 281, 53 C. C. A. 559, plaintiff, desiring transportation to Dawson City from Chicago, paid the defendant railroad company \$362 and received in return a coupon ticket for transportation to Seattle and an order on a steamship company for transportation from Seattle to Dawson. The order stated its value at \$300. It was held that there was no through contract to transport plaintiff from Chicago to Dawson City, and defendant could not be held liable for a delay occurring after plaintiff left Seattle.

when the question is as to responsibility for the loss of the passenger's baggage, the carriage of which is regarded as a mere incident of the carriage of the passenger.²² And consequently it has been held that, in the absence of an express contract for through transportation, or circumstances from which it will be implied, the holder of such coupon tickets is not bound to pursue his journey without intermission when it has been once begun, as in the case of a passenger whose trip is confined to the route of a single carrier, but may, at the end of each of its stages represented by such tickets, temporarily discontinue his passage without losing his right to resume it within a reasonable time.²³ This rule has also been extended

22. *Knight v. The Railroad*, 56 Me. 234; *Hartan v. The Railroad*, 114 Mass. 44; *Kessler v. The Railroad*, 7 Lans. 62; *Hood v. The Railroad*, 22 Conn. 1; *Elmore v. The Railroad*, 23 *id.* 457; *Ellsworth v. Tartt*, 26 Ala. 733; *Sprague v. Smith*, 29 Vt. 421; *Nashville, etc. R. R. v. Sprayberry*, 9 Heisk. 852.

But see, *contra*, *Hutchins v. Pennsylvania R. Co.*, 181 N. Y. 186, 73 N. E. 972, 106 Am. St. Rep. 537, *affirming* 86 N. Y. Supp. 1138, 92 App. Div. 612. (Strong dissenting opinion citing this section.)

23. *Brooke v. The Railway*, 15 Mich. 332; *Little Rock, etc. R'y Co. v. Dean*, 43 Ark. 529; *Nichols v. Railroad Co.*, 23 Ore. 123, 31 Pacific Rep. 296, 18 L. R. A. 55, 37 Am. St. Rep. 664.

In *Auerbach v. Railroad Co.*, 89 N. Y. 281, it appeared that plaintiff at St. Louis, had purchased a coupon ticket over several lines to New York. It was "good for one continuous passage," and was to be used on or before September 26. Leaving St. Louis on the day

of its purchase, plaintiff went over one line to Cincinnati, where he stayed one day; thence he went over another line to Cleveland, where he stayed a few hours; thence upon another coupon he went to Buffalo, where he arrived on the 24th and stayed one day, having then left one coupon which entitled him to a ride over defendant's road from Buffalo to New York. Being desirous of stopping at Rochester, he purchased a separate ticket to that place and went there on the 25th. On the afternoon of the 26th he entered defendant's train at Rochester for passage to New York, and tendered his ticket, which was duly accepted, and he rode upon it until the afternoon of the 27th, when a new conductor refused to honor it because it had run out, demanding the payment of fare and ejecting plaintiff. The court held the ejection wrongful; that plaintiff had a right to begin his journey on defendant's road at any point between Buffalo and New York, and that, having begun to use it before the ex-

to cases where passengers hold tickets having separate coupons for different divisions of the same line.²⁴

Sec. 1050. (§ 579.) Same subject—But contract for through carriage may be so made.—There is, however, nothing in the employment of such tickets inconsistent with the idea of a contract for through transportation by the first carrier which will make him the responsible party to the passenger for all injuries or losses throughout the entire journey. It may therefore be shown that there was such a contract, notwithstanding the acceptance of such tickets, and that the tickets were delivered in pursuance of the contract; and whether or not there was such a contract must, in every case of the kind, depend upon the facts.²⁵ In *Quimby v. Vanderbilt*,²⁶ the evidence

piration of the time, he could lawfully complete his journey upon it.

24. *Spencer v. Lovejoy Co.*, 96 Ga. 657, 23 S. E. Rep. 836, 51 Am. St. Rep. 152.

25. *Cherry v. Railroad Co.*, 61 Mo. App. 303; s. c. 52 Mo. App. 499; *Talcott v. Railroad Co.*, 159 N. Y. 461, 54 N. E. Rep. 1, reversing in part and affirming in part 35 N. Y. Supp. 574, 89 Hun, 492; s. c. 66 Hun, 456, 21 N. Y. Supp. 318.

A railroad may, by its advertisements, treat the entire journey over its own and connecting lines as an entire trip for which it alone would be responsible, and in such case it would be liable in damages for an accident happening on the connecting carrier's lines, due to an overcrowded condition of the cars. *Railroad Co. v. Dumser*, 161 Ill. 190, 43 N. E. Rep. 698, affirming 60 Ill. App. 93.

A railroad company selling a ticket over its own and a con-

necting line, which connecting line is merely the means of reaching the real terminus of its road, and to which its train is transferred, must be held responsible for any negligence during the transfer, whether by the acts or omissions of its own immediate servants or those of the connecting line by which it causes its trains to be so transferred. *Railroad Co. v. Gates*, 162 Ill. 98, 44 N. E. Rep. 1118, affirming 61 Ill. App. 211.

Where there is evidence tending to show the operation of the road, on which the injury occurred, by the defendant at the time of the accident, defendant cannot evade liability by showing that its charter did not authorize it to operate such road, and that the ticket held by the passenger provided that the defendant assumed no responsibility beyond its own line. *Railroad Co. v. Rambo*, 59 Fed. 75, 8 C. C. A. 6, 16 U. S. App. 277.

26. 17 N. Y. 306.

was positive of a verbal contract by the defendant to carry the plaintiff from New York to San Francisco, and there were various facts and circumstances besides, tending to prove that the contract was entire on his part; and although the plaintiff had accepted separate tickets for different parts of the route, parol evidence of the real contract was held to be admissible. "They" (the tickets), said Denio, J., "are quite consistent with a more special bargain. . . . We do not say that the receiving of separate tickets for the different lines is not evidence of some weight upon the question whether the contract was entire, but we hold that it does not come within the rule which excludes parol testimony respecting a contract which has been reduced to writing." But if nothing more be shown than the sale of the tickets, it will be presumed that nothing further was contemplated than that the carrier should be responsible for his own route alone.²⁷ And while proof of the fact that the passage money was paid for the whole trip, and was, by an agreement between them, to be divided among the carriers upon the different routes in a specified manner, would not establish such a partnership arrangement as would make them jointly or separately liable for the negligence of each other, yet if it could be shown that the agreement was to divide the net profits instead of gross receipts, the rule would be different.²⁸ So if it should appear that the contract with the carrier was for through transportation, and that the succeeding carriers acted in its accomplishment merely as agents, the contract would be construed as entire, and the initial carrier would be held liable for the negligence of the succeeding carriers or their failure to live up to the terms of the contract made by the initial carrier with the passenger.²⁹

27. *Milnor v. The Railroad*, 53 N. Y. 363; *Kessler v. The Railroad*, 61 *id.* 538; *Talcott v. Railroad Co.*, 80 N. Y. Supp. 149, 39 Misc. 443.

28. *Ante*, § 249 *et seq.*

29. *Railroad Co. v. Crow*, 74 N.

W. Rep. 1066, 54 Neb. 747, 69 Am. St. Rep. 741; *Bussman v. Transit Co.*, 71 Fed. 654; s. c. 29 N. Y. Supp. 1066, 9 Misc. 410. (Initial carrier held liable for connecting carrier's failure to provide state-room.)

Sec. 1051. Effect of non-designation of route in ticket when there is a longer and shorter route.—Where the carrier has two lines of road between two points, one of which is shorter than the other, and a passenger is furnished a ticket which is silent as to which route he may travel over, it is the duty of the passenger to take the shorter route; but proof may be offered to show that there was a custom or usage followed by the carrier of permitting passengers, under similar circumstances, to ride over the longer route and, if the proof is sufficient to establish a general custom or usage to that effect, such usage or custom becomes a part of the contract of carriage entitling the passenger to carriage over the longer route.³⁰

Sec. 1052. (§ 580.) If ticket does not express the entire contract, it may be shown by other proof.—Passenger tickets do not generally set out the full contract between the parties, and are for the most part mere memoranda, importing a contract on the part of the carrier to carry the passenger from one given point to another, in the manner in which the holders of such tickets are usually carried. As is said in one case, the real contract between the carrier and the passenger is usually made before the ticket is delivered, and where it does not purport to be the complete agreement between the carrier and the passenger, it has been held that suppletory evidence is competent to show what was the real contract indicated by the ticket.³¹ In this incomplete form the tickets are no more than

30. *Milroy v. Railroad Co.*, 98 Iowa, 188, 67 N. W. Rep. 276.

See also, *Railroad Co. v. Harper*, 83 Miss. 560, 35 So. Rep. 764, 64 L. R. A. 283, 102 Am. St. Rep. 469; *Church v. Railway Co.*, 6 S. Dak. 235, 60 N. W. Rep. 854, 26 L. R. A. 616.

31. *Northern R. R. Co. v. Page*, 22 Barb. 130; *Barker v. Coffin*, 31 *id.* 556; *Nevins v. The Bay State Co.*, 4 Bosw. 225; *Brown v. The Railroad*, 11 Cush. 97; *Johnson v. The Railroad*, 46 N. H. 213; *Raw-*

son v. The Railroad, 43 N. Y. 212; *Elmore v. Sands*, 54 *id.* 512; *Crosby v. Railroad Co.*, 69 Me. 418; *Burnham v. Railroad Co.*, 63 Me. 298; *Coine v. Railway Co.*, 123 Iowa, 458, 99 N. W. Rep. 134; *Railway Co. v. Lyons*, 20 Ky. L. R. 516, 46 S. W. Rep. 209; *Railway Co. v. Kinnebrew*, 7 Tex. Civ. App. 549, 27 S. W. Rep. 631.

An instruction that a railroad ticket is only a symbol, and a piece of evidence showing what the real contract is, is properly

the tokens or checks which the bailor may take from the common carrier as evidence of his receipt of goods for the purpose of being carried, and which would not be held to preclude the bailor from showing a special contract with the carrier as to the terms upon which they had been accepted.³²

But where the passenger has bought and been given such a ticket unlimited on its face, evidence of rules or regulations of the carrier tending to defeat the apparent right conferred by the ticket is not admissible if the passenger was not informed of them.³³ Neither can he be bound, by accepting it, by limitations or conditions printed upon the back of the ticket, which he did not see or know of, and to which his attention was not called at the time he accepted it.³⁴

As has been pointed out before, there is a distinction between mere tokens or checks not purporting to be contracts between the carrier and the purchaser and tickets, which by written conditions inserted therein, purport to be special contracts. A ticket of the latter class, if its limitations are supported by an adequate consideration, will be binding upon the person who accepts it as entitling him to a right to be carried, and parol evidence cannot be introduced to alter or vary its

refused. A railroad ticket may be more than a symbol, and it may not show what the real contract is. *Dixon v. Railroad Co.*, 179 Mass. 242, 60 N. E. Rep. 581.

32. *Ames v. Southern Pacific Co.*, 141 Cal. 728, 75 Pac. Rep. 310, 99 Am. St. Rep. 98.

33. *Pennsylvania R. Co. v. Spicker*, 105 Penn. St. 142; *Maroney v. Railway Co.*, 106 Mass. 153.

34. *Brown v. Railroad Co.*, 11 Cush. 97; *Malone v. Railroad Co.*, 12 Gray, 388; *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Railway Co. v. Nicholai*, 4

Ind. App. 119, 30 N. E. Rep. 424, 51 Am. St. Rep. 206, citing *Hutchinson Carr.*

"A ticket is no notice of conditions concealed therein by fine print, unless the attention of the holder is in some way directed to them. There is no presumption that a passenger assents to the terms of a complex ticket unless he has notice of what they are." *Hutchins v. Pennsylvania R. Co.*, 181 N. Y. 186, 73 N. E. Rep. 972, 106 Am. St. Rep. 537, *affirming* 86 N. Y. Supp. 1138, 92 App. Div. 612. See also, *Railway Co. v. Record*, — Ark. —, 85 S. W. Rep. 421.

express provisions.³⁵ The consideration for the limitations in such a ticket is usually found in the form of a reduced rate.³⁶ In construing such a special contract embodied in the ticket

35. *Fonesca v. Steamship Co.*, 153 Mass. 553, 27 N. E. Rep. 665; *Walker v. Price*, 62 Kan. 327, 62 Pac. Rep. 1001, 84 Am. St. Rep. 392; *Railway Co. v. Harrison*, 97 Tex. 611, 80 S. W. Rep. 1139, *reversing* (Tex. Civ. App.) 77 S. W. Rep. 1036; *Abram v. Railway Co.*, 83 Tex. 61, 18 S. W. Rep. 321; *Boling v. Railroad Co.*, — Mo. —, 88 S. W. Rep. 35.

A ticket issued to a passenger and signed by him constitutes a contract in so far at least as the stipulations therein contained, and its effect, as expressed by its positive terms, cannot be contradicted or varied by parole evidence. *Rolfs v. Railway Co.*, 66 Kan. 272, 71 Pac. Rep. 526; *Eastman v. Railroad Co.*, 70 N. H. 135, 46 Atl. Rep. 54 (mileage book); *Watson v. Railway Co.*, 54 N. Y. Supp. 201, 24 Misc. Rep. 628 (mileage book).

36. *Railway Co. v. De Saussure*, 116 Ga. 53, 42 S. E. Rep. 479; *Spiess v. Railroad Co.*, 71 N. J. Law 90, 58 Atl. Rep. 116; *Railroad Co. v. Bullock*, 60 N. J. Law 24, 36 Atl. Rep. 773, 37 L. R. A. 417; *Simis v. Railroad Co.*, 20 N. Y. Supp. 639, 1 Misc. Rep. 179; *Watson v. Railroad Co.*, 104 Tenn. 194, 56 S. W. Rep. 1024, 49 L. R. A. 454; *Railroad Co. v. Turner*, 100 Tenn. 214, 47 S. W. Rep. 223, 43 L. R. A. 140; *Ketcheson v. Railroad Co.*, 19 Tex. Civ. App. 290, 46 S. W. Rep. 907.

In *Railway Co. v. De Saussure*, *supra*, the purchaser of a reduced rate ticket containing conditions

that no rebate on account of the non-use of the ticket from any cause would be allowed, and that the ticket should be presented to the conductor on each trip, was held not entitled to a rebate or to travel without paying fare on the loss of his ticket.

In *Spiess v. Railroad Co.*, *supra*, a passenger was held bound by a provision on a 1000-mile ticket that the carrier would not assume responsibility beyond its own line.

In *Railroad Co. v. Bullock*, *supra*, a passenger traveling on a reduced rate ticket was held not entitled to carry groceries as baggage when his ticket restricted his baggage to wearing apparel only.

In *Simis v. Railroad Co.*, *supra*, and *Ketcheson v. Railroad Co.*, *supra*, evidence as to statements of ticket agents were held inadmissible.

When the purchaser buys a ticket at less than the usual fare, he is thereby put upon notice that his ticket may contain special conditions or rules, and if he has the misfortune to be unable to read or write, the burden is on him either to make that fact known to the agent, or to ascertain from some one who can read what the terms and conditions of his ticket are, and if, therefore, he accepts the ticket in ignorance of its terms, he will nevertheless be bound by its reasonable requirements. *Watson v. Railroad Co.*, *supra*.

of a passenger, language of uncertain or doubtful meaning should generally be taken in its strongest sense against the carrier.³⁷

Sec. 1053. (§ 580a.) Passenger is bound by terms of ticket contract.—It may therefore be stated as a general rule that where the passenger has entered into a special contract with the carrier, evidenced by his ticket, he is entitled only to those rights which the ticket confers, and is bound to perform the obligations which the ticket imposes upon him.³⁸ But if the passenger is unable to comply with those obligations by reason of the carrier's failure to provide the requisite agents, or by reason of its failure to provide its agents with the requisite facilities, or by reason of the negligent failure of its agents to perform their duty, performance of the conditions by the passenger will be excused.³⁹ Thus where a mileage ticket pro-

37. *Railroad & Banking Co. v. Clarke*, 97 Ga. 706, 25 S. E. Rep. 368.

38. *Dunlap v. Railroad Co.*, 35 Minn. 203; *Pennington v. Railroad Co.*, 62 Md. 95; *Hill v. Railroad Co.*, 63 N. Y. 101; *Lillis v. Railway Co.*, 64 Mo. 464; *Downs v. Railroad Co.*, 36 Conn. 287; *Sherman v. Railway Co.*, 40 Iowa, 45; *Powell v. Railroad Co.*, 25 Ohio St. 70; *Fonesca v. Steamship Co.*, 153 Mass. 553, 27 N. E. Rep. 665; *Railway Co. v. Bennett*, 50 Fed. 496, 1 C. C. A. 544, 6 U. S. App. 95; *Callaway v. Mellett*, 15 Ind. App. 366, 44 N. E. Rep. 198; *Rolfs v. Railway Co.*, 66 Kan. 272, 71 Pac. Rep. 526; *Rogers v. Railroad Co.*, 57 N. J. Law 703, 34 Atl. Rep. 11; *Crary v. Railroad Co.*, 203 Pa. St. 525, 53 Atl. Rep. 363, 93 Am. St. Rep. 778, 59 L. R. A. 815; *Railway Co. v. Daniels*, (Tex. Civ. App.) 29 S. W. Rep. 426.

39. *Railroad Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct.

R. 356, 36 L. Ed. 71; *Pennsylvania Co. v. Lenhart*, 120 Fed. 61, 56 C. C. A. 457; *Railroad Co. v. Pauson*, 70 Fed. 585, 17 C. C. A. 287, 44 U. S. App. 178, 30 L. R. A. 730; *Gregory v. Railroad Co.*, 10 Neb. 250, 4 N. W. Rep. 1025.

Contra, *Railroad Co. v. Stockdale*, 83 Md. 245, 34 Atl. Rep. 880.

In *Railroad Co. v. Pauson*, *supra*, the passenger presented his ticket to have it stamped, but the agent negligently omitted to do so.

See also cases in following section on refusal of agent to validate ticket.

A regulation of the company that a station at a village of less than 50 inhabitants is open for the transaction of business from 7 a. m. to 7 p. m. is reasonable, and the failure of the company to have an agent at that point at other times does not excuse a passenger from performing conditions as to stamping, etc., required of him in consideration of a reduced

vided that it "must be presented at ticket office at starting point, where the agent will issue in exchange for mileage coupons a mileage exchange ticket," and the carrier's agent was not supplied with such tickets, the carrier was guilty of a breach of contract in ejecting a passenger from train who was unable to obtain exchange tickets from the agent, and was liable in damages for such ejection.⁴⁰ In such cases, however, in accordance with the rule that coupon tickets will not be deemed contracts for through carriage in the absence of express terms, the action must be brought against the particular carrier through whose default the injury occurred.⁴¹

Sec. 1054. (§ 580b.) Same subject—Round-trip ticket requiring identification.—Where, in consideration of a reduced rate, a "round-trip" ticket is sold by which the passenger is to be conveyed to the point of destination and back, and the terms of the contract are that the ticket shall be good for the return trip only upon condition that the passenger will present himself to the ticket agent at the point of destination, identify himself as the original purchaser and procure the ticket to be there stamped, or shall comply with other similar requirements,⁴² the validity of the ticket for the return passage depends upon his compliance with the contract, and in case he fails to comply he may be refused carriage and ejected from the car.⁴³ Such a requirement, being for the benefit of

fare. *Railway Co. v. Wright*, 18 Ind. App. 125, 47 N. E. Rep. 491.

40. *Pennsylvania Co. v. Lenhart*, 120 Fed. 61, 56 C. C. A. 457; *Railway Co. v. Street*, 26 Ind. App. 224, 59 N. E. Rep. 404.

41. *Mosher v. Railroad Co.*, 127 U. S. 390.

42. As, to exchange his ticket for a return check. *Howard v. Railroad Co.*, 61 Miss. 194.

43. *Mosher v. Railroad Co.*, 127 U. S. 390; *Boylan v. Railroad Co.*, 132 U. S. 146; *Moses v. Railroad Co.*, 73 Ga. 356; *Bethea v. Rail-*

road Co., 26 S. C. 91; *Edwards v. Railway Co.*, 81 Mich. 364; *Cloud v. Railway Co.*, 14 Mo. App. 136; *Taylor v. Railway Co.*, 4 Ont. L. R. 357, 2 Canadian R'y Cases 99; *Wenz v. Railway Co.*, 108 Ga. 290, 33 S. E. Rep. 970; *Dangerfield v. Railway Co.*, 62 Kan. 85, 61 Pac. Rep. 405; *Railroad Co. v. Stockdale*, 83 Md. 245, 34 Atl. Rep. 880; *Bowers v. Railroad Co.*, 158 Pa. St. 302, 27 Atl. Rep. 893; *Daniels v. Railroad Co.*, 62 S. Car. 1, 39 S. E. Rep. 762; *Watson v. Railroad Co.*, 104 Tenn. 194, 56 S. W.

the carrier, may be waived by him, and the necessity of the passenger's compliance will thereby be dispensed with.⁴⁴

Cases have often arisen under "round-trip" passenger tickets in which agents at terminal points have refused, as required by the tickets, to stamp and sign them for the return passage after the holders had done all required of them; and there is quite a diversity of opinion among the authorities as to the right of the passenger to attempt to return to his destination upon the ticket without this evidence upon it, and to recover damages for being ejected from the train, some holding that he has the right and can thus recover,⁴⁵ others hold-

Rep. 1024, 49 L. R. A. 454; *Reed v. Railroad Co.* (Tex. Civ. App.) 50 S. W. Rep. 432; *Railway Co. v. Arey*, 18 Tex. Civ. App. 457, 44 S. W. Rep. 894; *Pittsburgh, etc., R'y Co. v. Coll*, — Ind. App. —, 76 N. E. Rep. 816.

A provision in a special "round-trip" ticket, requiring identification, that the return passage shall commence on the date that the passenger identifies himself, is valid, and the passenger cannot rightfully commence his return journey under such ticket on a date later than that stamped upon the ticket as the date of identification. *Boling v. Railroad Co.*, — Mo. —, 88 S. W. Rep. 35. And where such a ticket provides that the carrier selling the ticket acts only as an agent for any connecting carrier, the fact that the agent at destination informs the passenger that the return journey can be commenced on a later date than that stated in the ticket as the date when such return journey must be commenced, cannot operate to bind the other carriers, since such agent is without authority to bind the other carriers; nor will the fact that

some of the carriers in the return route honor the ticket after it has expired affect the conduct of a subsequent carrier who ejects the passenger from the train. *Boling v. Railroad Co.*, *supra*.

If the passenger who purchases such a ticket is unable to read or write and therefore fails to comply with its provisions, he will nevertheless be bound by such requirement. *Watson v. Railroad Co.*, *supra*.

44. *Taylor v. Railroad Co.*, 99 N. C., 185. See, also, *Gregory v. Railroad Co.*, 10 Neb. 250; *Railroad Co. v. Blair*, 104 Tenn. 212, 55 S. W. Rep. 154.

But a waiver will not be presumed from the fact that a gate-man allowed the passenger to pass through the gate. (*Bowers v. Railroad Co.*, 158 Pa. St. 302, 27 Atl. Rep. 893); nor from the fact that other passengers have been allowed to travel without having their tickets validated, unless the practice is so frequent as to amount to a custom or an abandonment such as to mislead the passenger. (*Watson v. Railroad Co.*, *supra*.)

45. *Head v. Railway Co.*, 79 Ga.

ing that the refusal to authenticate, as required, is a breach of the contract of carriage giving rise to the only cause of action the passenger can have, which is to recover damages for such breach, and not for an ejection from the train which he has entered with knowledge that the ticket will not be respected.⁴⁶ The weight of authority and better view seems to be that the agreement of the carrier to have his agent perform the designated act is merely incidental and subsidiary to the contract of carriage, and the breach of it is not necessarily a repudiation by the carrier of its entire obligation. It may be true that the holder of the ticket may treat the refusal to authenticate it as a breach of the contract, and claim his damage therefor, but as the time has not arrived for performance of the contract to carry upon the return trip until the passenger enters the conveyance, the carrier may still perform, and the passenger, therefore, may elect to insist upon the performance until it is refused when it is due.⁴⁷

- This view, of course, does not go so far as to hold the carrier liable if the passenger declines to make proper proof of his identity, and the carrier's agent refuses to validate the ticket on that ground.⁴⁸ If the validating agent is not satisfied by the signature of the passenger as to his identity, the burden of producing further proof, if required by the agent, is upon the passenger. Nor is the agent required to accept the mere

358, 7 S. E. Rep. 217, 11 Am. St. Rep. 434; *Railway Co. v. Wood*, 114 Ga. 140, 39 S. E. Rep. 894, 55 L. R. A. 536; *Moore v. Railway Co.*, 102 Ga. 302, 29 S. E. Rep. 865; *Railway Co. v. McKenzie*, 102 Ga. 313, 29 S. E. Rep. 869; *Railway Co. v. Street*, 26 Ind. App. 224, 59 N. E. Rep. 404; *Railway Co. v. Jones*, (Tex. Civ. App.) 85 S. W. Rep. 37; *Railway Co. v. Martino*, 2 Tex. Civ. App. 643, 18 S. W. Rep. 1066; s. c. 21 S. W. Rep. 781; *Railroad Co. v. St. John*, 13 Tex. Civ. App. 257, 35 S. W. Rep. 501; *Texas & P. R'y Co. v. Payne*, 98 Tex. 211, 87 S. W. Rep. 330, 70 L. R. A. 946.

46. *McGhee v. Reynolds*, 117 Ala. 413, 23 So. Rep. 68; s. c. 129 Ala. 540, 29 So. Rep. 961; *Central Trust Co. v. Railway Co.*, 65 Fed. 332.

47. *Texas & P. R'y Co. v. Payne*, 98 Tex. 211, 87 S. W. Rep. 330, 70 L. R. A. 946.

48. *Railway Co. v. Cannon*, 106 Ga. 828, 32 S. E. Rep. 874; *Sinnott v. Railroad Co.*, 104 Tenn. 233, 56 S. W. Rep. 836; *Abram v. Railway Co.*, 83 Tex. 61, 18 S. W. Rep. 321.

verbal assurance of the passenger as to his identity. But ordinarily, where it becomes the duty of the carrier's agent to identify the passenger as the original purchaser of the ticket, he cannot act arbitrarily, but must afford the passenger a reasonable opportunity to identify himself;⁴⁹ and if he is not satisfied with the passenger's signature, he should, it is said, permit the passenger, on his offering to do so, to procure some other means which are ready and near at hand.⁵⁰ And although the ticket provides that the passenger shall identify himself to the satisfaction of the carrier's agent, the passenger will only be required to offer such proof as would satisfy the mind of a reasonably conscientious and prudent person.⁵¹ And, in such cases, it will be a question for the jury whether the proof offered was such as would have satisfied the mind of a reasonably conscientious and prudent person selected by the carrier to pass upon the question.⁵²

Sec. 1055. (§ 580c.) Same subject—Provision that coupon shall not be good if detached.—So it is a common provision in the case of coupon tickets, mileage books, and other similar forms, that the several coupons shall not be good for passage if presented detached from the original book, stub or counterpart. Such a provision is reasonable, and the coupon if presented so detached may be refused.⁵³ Hence the holder of a mileage ticket cannot insist upon tearing off the coupons himself, even though it is done in the presence of the conductor,⁵⁴

49. *Southern R'y Co. v. Cassell*, — Ky. —, 92 S. W. Rep. 281; *Pittsburgh, etc. R'y Co. v. Coll*, — Ind. App. —, 76 N. E. Rep. 816; *Brigham v. So. Pac. Co.*, — Cal. App. —, 84 Pac. Rep. 306; *Baltimore, etc. R. Co. v. Hudson*, — Ky. L. R. —, 92 S. W. Rep. 947.

50. *Pittsburgh, etc. R'y Co. v. Coll*, *supra*.

51. *Southern R'y Co. v. Cassell*, *supra*; *Pittsburgh, etc. R'y Co. v. Coll*, *supra*.

52. *Railway Co. v. Hudson*, 25 Ky. Law Rep. 2154, 80 S. W. Rep. 454.

53. *Norfolk, etc. R. Co. v. Wysor*, 82 Va. 250; *Louisville, etc. R. Co. v. Harris*, 9 Lea, 180; *Boston, etc. R. Co. v. Chipman*, 146 Mass. 107; *De Lucas v. Railroad Co.*, 38 La. Ann. 930; *Houston, etc. R. Co. v. Ford*, 53 Tex. 364.

54. *Norfolk, etc. R. Co. v. Wysor*, 82 Va. 250; *Louisville etc. R. Co. v. Harris*, 9 Lea, 180.

unless waived by a general custom prevailing between the carrier and his passengers.⁵⁵

But where a round-trip ticket, issued in two connected parts, one of which is to be used each way, and containing on the going part the provision that it shall not be good if detached, becomes separated by accident and both parts are presented together, this separation, it is held, will not invalidate it;⁵⁶ and so it is held that where the going part of such a ticket is not used, the carrier may not insist on the return trip in retaining both parts, and if the passenger in the presence of the conductor separates them he may lawfully tender the return portion in payment of his fare.⁵⁷

Sec. 1056. (§ 580d.) Same subject—Provision that ticket shall not be transferable.—The ordinary railroad ticket issued without limitations or restrictions is transferable, passing by delivery, and the holder is entitled to ride upon it;⁵⁸ but where, in consideration of a reduced rate, it is expressly conditioned that it shall not be transferable, or shall be void in the hands of other than the first purchaser, the condition is valid and the transferee cannot ride upon it,⁵⁹ unless the pro-

55. *Thompson v. Truesdale*, 61 Minn. 129, 63 N. W. Rep. 259, 52 Am. St. Rep. 579.

56. *Wightman v. Railroad Co.*, 73 Wis. 169; *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. Rep. 439.

57. *Chicago, etc. R. Co. v. Holdridge* 118 Ind. 281.

58. *Sleeper v. Railroad Co.*, 100 Penn. St. 259; *Carsten v. Railroad Co.*, 44 Minn. 454, 47 N. W. Rep. 49; *Hoffman v. Railroad Co.*, 45 Minn. 53, 47 N. W. Rep. 312; *The Willamette Valley*, 71 Fed. 712; *Nichols v. Railroad Co.*, 23 Ore. 123, 31 Pac. Rep. 296, 18 L. R. A. 55, 37 Am. St. Rep. 664; *Railroad Co. v. Ing*, 29 Tex. Civ. App. 398, 68 S. W. Rep. 722.

A "round-trip" railroad ticket which contains a provision that it shall be used only by the original holder whose signature it bears, but not in fact signed by anyone, and which is sold on the express understanding that it shall be used by A in going to, and by B in returning from the place of destination, is not void when presented by B upon the return passage after having been used by A for the first part of the journey. *Jevons v. Railroad Co.*, 70 Kan. 491, 78 Pac. Rep. 817.

59. *Post v. Railroad Co.*, 14 Neb. 110; *Cody v. Railroad Co.*, 4 Saw. 114; *Way v. Railway Co.*, 64 Iowa, 48; *Walker v. Railway Co.*, 15

vision is waived.⁶⁰ Where, however, the provision is merely that it will not be accepted if transferred, the company's right does not extend further than to a refusal to accept it, and does not extend to a confiscation of the ticket,⁶¹ though a stipulation giving that right would be valid.⁶²

Mo. App. 333; *Drummond v. Railroad Co.*, 7 Utah, 118, 25 Pac. Rep. 733; *Railroad Co. v. Frank*, 110 Fed. 689; *Davis v. Railroad Co.*, 107 Ga. 420, 33 S. E. Rep. 437; *Dangerfield v. Railway Co.*, 62 Kan. 85, 61 Pac. Rep. 405; *Schubach v. McDonald*, 179 Mo. 163, 78 S. W. Rep. 1020, 65 L. R. A. 136, 101 Am. St. Rep. 452; *Levinson v. Railway Co.*, 17 Tex. Civ. App. 617, 43 S. W. Rep. 901.

So a condition on a commutation ticket that it shall be good for the passage of those only who have signed it is valid. *Granier v. Railroad Co.*, 42 La. Ann. 880, 8 S. Rep. 614.

And if other names than that of the purchaser are fraudulently inserted into a railway mileage book which is non-transferable, the book will be inoperative as to the carrier. *Holden v. Railroad Co.*, 73 Vt. 317, 50 Atl. Rep. 1096.

When the one to whom a mileage book is issued dies, it passes to his personal representatives and cannot be used for the purpose of transporting his remains. *Minish v. Railway Co.*, 135 N. Car. 342, 47 S. E. Rep. 432.

60. Thus, see *Robostelli v. Railroad Co.*, 33 Fed. Rep. 796.

A mileage ticket provided that, when requested by the conductor at the time the ticket was presented for passage, the purchaser would sign his name in the presence of the conductor and otherwise identify himself as the ori-

ginal purchaser. It was held that where the conductor refused the purchaser's offer to identify himself by signing his name to the ticket, he had no right to insist on other means of identification, and that the carrier was liable for the act of the conductor in expelling him from the train for his refusal to pay fare. *Railroad Co. v. Anderson*, 90 Va. 1, 17 S. E. Rep. 757, 44 Am. St. Rep. 884.

Where the purchaser of a non-transferable mileage ticket explains to the agent of the company that he is purchasing the ticket in an assumed name, and the agent assents thereto, the company will be bound by such assent and will be liable for the act of its conductor in taking the ticket when presented by the purchaser. *Railway Co. v. Pendergast*, 75 Ill. App. 133.

A purchaser from the original holder of a non-transferable ticket has no right to act upon the assurance given by a ticket agent that the ticket will be accepted for such purchaser's passage, when it is further stipulated in the ticket that no agent shall have authority to alter, modify, or waive in any particular the terms or conditions therein set forth. *Coyle v. Railway Co.*, 112 Ga. 121, 37 S. E. Rep. 163.

61. *Post v. Railroad Co.*, 14 Neb. 110; *Railway Co. v. Pendergast*, 75 Ill. App. 133.

62. *Friedenrich v. R. R. Co.*, 53 Md. 201; *Rahilly v. Railroad Co.*,

The fact that a non-transferable ticket, presented by another than the one lawfully entitled to ride thereon, is accepted by the conductor, in ignorance that such person is not the rightful holder, will not estop a second conductor, while performing his duties, from questioning that person's right to its use, and, if it appears that he is not entitled to ride, he may be ejected from the train on refusal to pay the proper fare.⁶³

By the weight of authority, a carrier is also entitled to look beyond the transferee who actually presents a non-transferable ticket on the train, and may obtain an injunction restraining ticket brokers from buying and selling non-transferable tickets issued at a reduced rate;⁶⁴ but in at least one case this right has been denied, the court holding that the ticket itself may be lawfully and properly transferred to any one, though the right to transportation may be limited to the purchaser under the provisions of the contract.⁶⁵

Sec. 1057. Same subject—Passenger should truthfully answer questions of conductor concerning his identity.—As the carrier has a right to satisfy himself that the holder of a

66 Minn. 153, 68 N. W. Rep. 853; *Mueller v. Railway Co.*, 75 Minn. 109, 77 N. W. Rep. 566; *Eastman v. Railroad Co.*, 70 N. H. 135, 46 Atl. Rep. 54; *Moore v. Railroad Co.*, 41 W. Va. 160, 23 S. E. Rep. 539.

But such a clause will be strictly construed and, if presented by another than the lawful owner, and the same is done without the knowledge or consent of the owner, it is not subject to forfeiture as against such owner. *Mueller v. Railway Co.*, *supra*.

The only provision as to forfeiture being when the ticket is presented by other than the original purchaser, if it is taken up from the original purchaser be-

cause he refuses to identify himself in a manner not required by the ticket, such act is a violation of the contract. *Railroad Co. v. Anderson*, 90 Va. 1, 17 S. E. Rep. 757, 44 Am. St. Rep. 884.

63. *Dangerfield v. Railway Co.*, 62 Kan. 85, 61 Pac. Rep. 405.

64. *Railroad Co. v. Caffrey*, 128 Fed. 770; *Railroad Co. v. Bitterman*, 128 Fed. 176, *aff'd*, — C. C. A. —, 144 Fed. 34; *Railroad Co. v. Frank*, 110 Fed. 689; *Railway Co. v. McConnell*, 82 Fed. 65; *Schubach v. McDonald*, 179 Mo. 163; 78 S. W. Rep. 1020, 65 L. R. A. 136; *Kinner v. Railway Co.*, 69 Ohio St. 339, 69 N. E. Rep. 614.

65. *Railroad Co. v. Reeves*, 85 N. Y. Supp. 28, 41 Misc. 490.

non-transferable ticket is actually the person named therein, it is the duty of a passenger to make frank and truthful answers to the questions put to him concerning his identity, and, if he wilfully and obstinately refuses to do so, his conduct deserves full consideration in determining whether punitive damages are allowable for his consequent ejection from the train, even though it subsequently appears that he was rightfully thereon. This rule was announced in a case in which the plaintiff, a passenger on defendants' train, tendered to the conductor a mileage book. Among the conditions upon which the book was issued was one that it was good only for the person in whose name it was issued. The conductor was not personally acquainted with the plaintiff, and for identification asked him if the name on the ticket was his name. The plaintiff refused to say whether it was or not. The evidence showed that the plaintiff, when asked if the name was his, replied that it was none of the conductor's business. As the plaintiff was leaving the train, the conductor caused his arrest for fraudulently evading the payment of his fare. It appeared that the book belonged to the plaintiff, and that he was entitled to ride thereon. In an action for false arrest, it was held that while the plaintiff's arrest was unlawful, and that he was entitled to compensatory damages for the false arrest, still the above rule applied as to punitive damages.¹

Sec. 1058. (§ 580e.) Same subject—Provision that ticket shall not be good on certain trains.—As has been seen,² a railroad company is not required to carry passengers upon all its trains, but may lawfully divide its traffic, accepting passengers upon some and refusing them upon others. A person, therefore, cannot insist upon being received as a passenger upon trains to which his ticket does not entitle him to admission as such.³ So where it has provided adequate facilities for

1. *Palmer v. Railroad Co.*, 92 Me. 399, 42 Atl. Rep. 800, 69 Am. St. Rep. 513.

2. *Ante*, § 964.

3. *Railroad Co. v. Feeley*, 163 Mass. 205, 40 N. E. Rep. 20; *Eng-*

general traffic, it may run limited or special trains upon which only a given number will be accepted as passengers, and for carriage upon which a higher rate of fare may be charged.⁴

Sec. 1059. (§ 580f.) Same subject—Passenger can go only in direction which ticket indicates.—So where the ticket provides for a passage in a given direction, as from A. to B., the passenger cannot insist upon riding in the opposite direction, as from B. to A.⁵

But where, in the case of a round-trip ticket, the conductor

land *v. Railroad Co.*, 32 Tex. Civ. App. 86, 73 S. W. Rep. 24.

Thus a passenger having ticket good only on excursion train cannot ride on general train (*McRae v. Railroad Co.*, 88 N. C. 526); or having ticket good only on freight trains cannot ride on passenger train. *Thorp v. Railroad Co.*, 61 Vt. 378.

The failure of a train carrying second-class passengers to connect with the proper train of another road, the two roads forming a through line, does not impose upon the second road an obligation to transport passengers holding second-class through tickets upon the next train—a limited express—upon which such tickets are not valid. Nor can a person insist upon being carried as a passenger upon trains to which his ticket does not entitle him to admission merely because the ticket agent or baggage master instructed him to board that train, when the ticket itself provides that “no agent or employe has power to modify this contract in any particular.” *Railway Co. v. Bennett*, 50 Fed. 496, 1 C. C. A. 544, 6 U. S. App. 95.

The fact that on former occasions the gate keeper at the station had informed an intending pas-

senger that his ticket entitled him to ride on a particular train, and that the conductor on those occasions had accepted coupons therefrom for passage on that train, constitutes, at most, a waiver of the ticket as to those particular trips, and not as to subsequent trips. *Railroad Co. v. Feeley*, *supra*.

Passengers on branch lines who miss connections or main lines have no right to ride on limited or special trains on the main line on which their ticket does not entitle them to ride. The mere fact that their journey would be expedited by so doing makes no difference. *Pennsylvania R. Co. v. Parry*, 55 N. J. Law 551, 27 Atl. Rep. 914, 22 L. R. A. 251, 39 Am. St. Rep. 654.

4. *Lake Shore R'y Co. v. Rosenzweig*, 113 Penn. St. 519. May charge extra for chair car. *Wright v. Railway Co.*, 78 Cal. 360.

A railroad company has the right to run special limited trains for those only who secure sleeping accommodations. *Ames v. Railroad Co.*, 141 Cal. 728, 75 Pac. Rep. 310, 99 Am. St. Rep. 98.

5. *Keeley v. Railroad Co.*, 67 Me. 163; *Pease v. Railroad Co.*, 101 N. Y. 367; *Godfrey v. Railway Co.*,

takes up and retains by mistake the return coupon instead of the going one, it is held that the passenger has the right to be carried on the return trip on the going coupon, where he has not discovered the mistake and explains it to the conductor on his return trip.⁶

Sec. 1060. (§ 580g.) Same subject—How when train does not stop at passenger's destination.—The railroad company is not required to stop all of its trains at every station, and upon all roads of importance through trains are run which stop only at the larger towns upon the line. The passenger, therefore, is bound to inquire and ascertain whether the train which he proposes to take stops at the station to which his ticket entitles him to ride, and if, without such inquiry, he boards a train which, by the regulations of the carrier, does not stop at his destination, he cannot require the conductor to stop there, though he may lawfully ride to the nearest point short of his destination at which the train regularly stops.⁷ But he can-

116 Ind. 30; *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. Rep. 439.

6. *Railroad Co. v. Fix*, 88 Ind. 381; *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. Rep. 439.

7. *Richmond, etc. R. Co. v. Ashby*, 79 Va. 130; *Railroad Co. v. Cameron*, 66 Fed. 709, 14 C. C. A. 358, 32 U. S. App. 67; *Railway Co. v. Ludlam*, 57 Fed. 481, 6 C. C. A. 454, 13 U. S. App. 540; *Railway Co. v. Bell*, (Tex. Civ. App.) 87 S. W. Rep. 730; *Railway Co. v. Walden*, (Tex. Civ. App.) 46 S. W. Rep. 87, citing *Hutch. on Carr.*; *Railway Co. v. Moore*, 98 Tex. 302, 83 S. W. Rep. 362; *Railroad Co. v. Miles*, 18 Ky. L. R. 580, 37 S. W. Rep. 486; *Hancock v. Railroad Co.*, 27 Ky. L. R. 434, 85 S. W. Rep. 210; *Sira v. Railway Co.*, 115 Mo. 127, 21 S. W. Rep. 905, 37 Am. St. Rep. 386; *Usher v. Railway Co.*,

— Kan. —. 80 Pac. Rep. 956.

The same rule holds good if a person, without proper inquiry, takes a train which follows another branch of the road than the one leading to his destination. *Railway Co. v. Dawson*, (Tex. Civ. App.) 29 S. W. Rep. 1106.

But the doctrine that a passenger, who, by mistake, takes a wrong train, is not obliged to pay for his ride to the first station at which he has the opportunity to alight, does not apply to the holder of a season ticket who boards a train on which the ticket is not good to go to the next station at which he left the train. In such case the railroad is entitled to recover from him the amount of fare which he should have paid for the trip. *Railroad Co. v. Feeley*, 163 Mass. 205, 40 N. E. Rep. 20.

In an action of damages for

not ride further without paying fare to the place at which it next regularly stops, and, if he refuses to do so or to leave the train, he may lawfully be ejected and is without remedy.⁸

Where, however, he is misled by the acts or statements of the company or its agents into taking a train which does not stop at his destination, he is not without remedy.⁹ He cannot,

wrongful ejection at a place short of destination, when the passenger has tendered full fare to that point, a complaint is demurrable if it does not show that the regulations of the defendant provided for the discharge of passengers at that point. *Railroad Co. v. Lucas*, 18 Ind. App. 239, 47 N. E. Rep. 842.

Ordinarily where the carrier sells a ticket to a flag station at which its trains do not stop unless there are passengers on board the train who have purchased tickets to such station, it is the duty of the conductor to ascertain from the passenger, holding such a ticket, his destination, and to stop the train at such station for the purpose of allowing the passenger to leave it. Where, however, the passenger knows when he purchases his ticket that he will be required to inform the conductor that he desires to alight there, a different rule applies. *Railroad Co. v. Lyon*, 89 Ga. 16, 15 S. E. Rep. 24, 15 L. R. A. 857, 24 Am. St. Rep. 72.

8. *Pittsburgh, etc. R'y Co. v. Nuzum*, 50 Ind. 141; *Logan v. Railroad Co.*, 77 Mo. 663; *Pennsylvania Co. v. Wentz*, 37 Ohio St. 333; *Duling v. Railroad Co.*, 66 Md. 120; *Ohio, etc. R. Co. v. Applewhite*, 52 Ind. 540; *Chicago, etc. R. Co. v. Randolph*, 53 Ill. 510; *Plott v. Railroad Co.*, 63 Wis. 511; *Railway Co. v. Lightcap*, 7 Ind. App. 249,

34 N. E. Rep. 243; *Flood v. Railroad Co.*, 25 Ky. L. R. 2135, 80 S. W. Rep. 184; *Allen v. Railroad Co.*, 119 N. Carr. 710, 25 S. E. Rep. 787; *Scott v. Railroad Co.*, 144 Ind. 125, 43 N. E. Rep. 133, 32 L. R. A. 154; *Railroad Co. v. Adams*, 60 Ill. App. 571.

9. *Railroad Co. v. Little*, 66 Kan. 378, 71 Pac. Rep. 820, 61 L. R. A. 122, 97 Am. St. Rep. 376; *Atkinson v. Railway Co.*, 114 Ga. 146, 39 S. E. Rep. 888, 55 L. R. A. 223; *Railroad Co. v. Barkley*, 13 Ky. L. R. 331; *Railroad Co. v. Reynolds*, 55 Ohio St. 370, 45 N. E. 712, 60 Am. St. Rep. 706.

The proof should be confined to statements made by the agent contemporaneously with the purchase of the ticket, nor can a connecting road be held liable in damages for representations made by a foreign ticket agent as to the movement and stopping points of trains on its roads, which are incorrect, and differ from information given by its published time cards and folders. *Railroad Co. v. Cameron*, 66 Fed. 709, 14 C. C. A. 358, 32 U. S. App. 67.

The mere fact that the ticket is sold at the time when a train is expected to arrive does not amount to a representation that that is the proper train for him to take, nor does the fact that the ticket is marked "Good for this day and train only." *Duling v. Railroad*

indeed, insist that the conductor shall violate his instructions and stop the train at the place in question,¹⁰ nor can he insist upon remaining on the train after learning that it will not stop.¹¹ His remedy in such a case is to leave the train and seek transportation by some other means, and then to recover of the company damages for the injury he has sustained by its breach of contract.¹² He has not the right, however, though erroneous notions in this regard seem very generally to prevail, to aggravate his injury by refusing to leave and making the application of force necessary for his removal. He is now wrongfully upon the train, and whatever force is reasonably necessary and proper to eject him he himself invites, and he cannot recover damages for an injury thereby sustained,¹³ though he is still entitled to protection against unnecessary and wanton violence.

But the railroad company may make a special arrangement by its authorized agents for the stopping of a particular train

Co., 66 Md. 120. So the mere fact that the ticket reads "Good on passenger trains only" is not a representation that all passenger trains stop at all stations. Ohio, etc. R'y Co. v. Swarthout, 67 Ind. 567. Where a ticket is sold for a train which does not stop at passenger's destination, he is entitled to damages for breach of contract. St. Louis, etc. R'y Co. v. Adcox, 52 Ark. 406; Railroad Co. v. Little, 66 Kan. 378, 71 Pac. Rep. 820, 61 L. R. A. 122, 97 Am. St. Rep. 376.

10. St. Louis, etc. R'y Co. v. Atchison, 47 Ark. 74; Marshall v. Railway Co., 78 Mo. 610; International, etc. R. Co. v. Hassell, 62 Tex. 256; Lake Shore R'y Co. v. Pierce, 47 Mich. 277; Wells v. Railroad Co., 67 Miss. 24.

11. Lake Shore R'y Co. v. Pierce, 47 Mich. 277; White v. Railroad Co., 133 Ind. 480, 33 N. E. Rep.

273; Turner v. McCook, 77 Mo. App. 196; Miller v. King, 166 N. Y. 394, 59 N. E. Rep. 1114, *affirming* 58 N. Y. Supp. 1145; s. c. 53 N. Y. Supp. 123, 32 App. Div. 389; s. c. 47 N. Y. Supp. 534, 21 App. Div. 192; s. c. 34 N. Y. Supp. 425, 88 Hun, 181; s. c. 32 N. Y. Supp. 332, 84 Hun, 309; Railway Co. v. Moorman, (Tex. Civ. App.) 46 S. W. Rep. 662.

12. And his complaint must be for the misdirection or breach of contract and not for the ejection. Marshall v. Railway Co., 78 Mo. 610; Lake Shore R'y Co. v. Pierce, 47 Mich. 277. Hicks v. R. Co., 68 Mo. 329, *contra*, is disapproved in later cases.

See also, Sira v. Railway Co., 115 Mo. 127, 21 S. W. Rep. 905, 37 Am. St. Rep. 386.

13. Lake Shore R'y Co. v. Pierce, 47 Mich. 277.

at a certain station at which, under its general rules and regulations, it is not required to stop. Such a contract is not unlawful, and the breach of it, whereby the ticket holder, induced to take passage under it, is prevented from reaching his destination as contemplated by the contract, will entail upon the railroad company liability for a violation of its duty.¹⁴

Sec. 1061. (§ 580h.) Same subject—How when by mistake he is given obviously wrong ticket.—So where the passenger, having paid fare to the point of destination, is, by the mistake of the company's agent, furnished with a ticket which upon its face entitles him to a ride only to a point short of his destination, or the like, the passenger, having accepted the ticket, cannot insist on riding upon that ticket beyond the point to which by its terms it entitles him. He must therefore pay fare to his destination or get off and continue his journey by other means, and, if he refuses, the conductor may eject him; but he may recover of the carrier damages for the injury he has sustained by reason of its breach of contract.¹⁵ Here too, however, the action will be for the breach of the contract, and not for the ejection.¹⁶ And he may not aggravate his injury by resisting ejection under otherwise proper conditions.¹⁷

14. *Railroad Co. v. Wilson*, 20 Ind. App. 5, 50 N. E. Rep. 90; *Noble v. Railroad Co.*, 4 Okl. 534, 46 Pac. Rep. 483; *Railway Co. v. Elliott*, 22 Tex. Civ. App. 31, 54 S. W. Rep. 410.

15. *Frederick v. Railroad Co.*, 37 Mich. 342; *Hufford v. Railroad Co.*, 53 Mich. 118; *Bradshaw v. Railroad Co.*, 135 Mass. 407; *Georgia R. Co. v. Olds*, 77 Ga. 673; *Mackay v. Railroad Co.*, 34 W. Va. 65, 11 S. E. Rep. 737; *Peabody v. Railway Co.*, 21 Oreg. 121, 26 Pac. Rep. 1053; *Railroad Co. v. Foster*, 134 Ala. 244, 32 So. Rep. 773, 92 Am. St. Rep. 25, citing *Hutch. on Carr.*; *Railroad Co. v. Stratton*, 111 Ill. App. 142; *Chase v. Railway Co.*, 70

Kan. 546, 79 Pac. Rep. 153, citing *Hutch. on Carr.*

16. *Frederick v. Railroad Co.*, *supra*; *Spink v. Railroad Co.*, 21 Ky. L. R. 778, 52 S. W. Rep. 1067, citing *Hutch. on Carr.*; *Railroad Co. v. Schaun*, 79 Md. 563, 55 Atl. Rep. 701; *Van Dusan v. Railway Co.*, 97 Mich. 439, 56 N. W. Rep. 848, 37 Am. St. Rep. 354.

17. *Frederick v. Railroad Co.*, *supra*; *South Florida R. Co. v. Rhodes*, 25 Fla. 40; *Pullman Car Co. v. Reed*, 75 Ill. 125; *Chicago, etc. R. Co. v. Griffin*, 68 Ill. 499; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; *Peabody v. Railway Co.*, 21 Oreg. 121, 26 Pac. Rep. 1053.

There is in these cases an element of negligence in the passenger in not seeing that he obtains and presents a ticket which is at least apparently regular.¹⁸

Sec. 1062. (§ 580i.) Same subject—How when ticket apparently good.—But where, though the ticket given to the passenger, either by the ticket agent or the conductor, is one which by the company's regulations is not sufficient for his transportation to the point agreed upon, there is nothing upon its face to indicate any such infirmity, and he has purchased or taken it in reliance, without negligence, upon the express or implied representation of the company's agent that it is good for the trip intended, the passenger must be deemed to be lawfully upon the train, and entitled to complete the journey according to the apparent import of his ticket. In this case he cannot lawfully be required either to leave the cars or pay additional fare upon demand, and if he is ejected, or compelled to pay fare to avoid ejection, he is entitled to recover damages.¹⁹ But an agent authorized to sell railroad

18. *Poulin v. Railway Co.*, 52 Fed. 197, 3 C. C. A. 23, 6 U. S. App. 298, 17 L. R. A. 800, *affirming* 47 Fed. 858.

19. *Hufford v. Railway Co.*, 53 Mich. 118; *Murdock v. Railroad Co.*, 137 Mass. 293; *Philadelphia, etc. R. Co. v. Rice*, 64 Md. 63; *Fell v. Railroad Co.*, 44 Fed. 248; *Railroad Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. R. 356, 36 L. Ed. 71; *Railroad Co. v. Littell*, 128 Fed. 546, 63 C. C. A. 44; *Pennsylvania Co. v. Lenhart*, 120 Fed. 61, 56 C. C. A. 457; *Scofield v. Railroad Co.*, 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224; *Callaway v. Mellett*, 15 Ind. App. 366, 44 N. E. Rep. 198; *Ellsworth v. Railway Co.*, 95 Iowa, 98, 63 N. W. Rep. 584, 29 L. R. A. 173; *Railroad Co. v. Little*, 66 Kan. 378, 71 Pac. Rep. 820, 61 L. R. A. 122, 97 Am. St.

Rep. 376; *Railroad Co. v. Harper*, 83 Miss. 560, 35 So. Rep. 764, 64 L. R. A. 283, 102 Am. St. Rep. 469; *Railroad Co. v. Reynolds*, 55 Ohio St. 370, 45 N. E. Rep. 712, 60 Am. St. Rep. 706; *Railway Co. v. Wilson*, 161 Ind. 153, 66 N. E. Rep. 950, 67 N. E. Rep. 993, 100 Am. St. Rep. 261; *Railroad Co. v. Cates*, 14 Ind. App. 172, 41 N. E. Rep. 712; *Jevons v. Railroad Co.*, 70 Kan. 491, 78 Pac. Rep. 817; *Cincinnati, etc. R'y Co. v. Harris*, — Tenn. —, 91 S. W. Rep. 211.

In *Railway Co. v. Street*, 26 Ind. App. 224, 59 N. E. Rep. 904, plaintiff presented an interchangeable mileage ticket which he had purchased of a passenger association of which defendant was a member, and demanded of defendant's agent an exchange ticket. He was informed by the agent that the

tickets has no implied powers after the sale of a ticket is fully completed and his duties in regard to it are at an end, and he cannot then bind the company by representations which contradict the plain terms of the ticket.²⁰

Sec. 1063. Same subject—Where two or more roads employ a joint ticket agent—Which road liable for his mistakes.—It sometimes happens that a ticket agent is agent for two railroad companies. If a person applies to such an agent for a ticket over one road, and by mistake the ticket agent gives him a ticket over the other road, his negligence is that of the first road, and the latter road is not liable to the purchaser for the agent's negligence or its consequences.²¹

supply of tickets was exhausted, and that the conductor on defendant's train would give him transportation on his mileage without exchange. The court held that he was not required to pay the regular fare and then sue the company for failure to carry him on his mileage, but he could insist on being carried on his mileage, and, if ejected, recover as for a tort. See also, *Pennsylvania Co. v. Lenhart*, 120 Fed. 61, 56 C. C. A. 457.

Where a ticket was taken up by the conductor, and afterwards, without producing it, the conductor claimed it was for a point short of the passenger's destination, demanded additional fare of the passenger which he refused to pay, and thereupon ejected the passenger from the train, the fact that the amount of additional fare wrongfully demanded was trifling, and could have been paid by the passenger, cannot be considered in mitigation of damages for such ejection. A carrier cannot place a passenger in such a position that, if he yields to the carrier's demands, a legitimate inference

might be drawn by other passengers that he was guilty of dishonesty in attempting to ride without paying the rightful fare. *Railroad Co. v. Arnold*, 8 Ind. App. 297, 34 N. E. Rep. 742.

Where the passenger presents a ticket which on its face entitles him to be carried, the company will not be permitted to show a custom on its part, and the part of other companies, to issue such tickets for certain days only when it is shown that the passenger had no knowledge of such a limitation. *Carvey v. Railroad Co.*, 133 Mich. 659, 95 N. W. Rep. 716.

Where a husband buys a ticket for his wife and signs his own name thereon on the representation of the agent that his wife could ride on it, his wife is entitled to use the ticket. *Railway Co. v. Goodman*, (Tex. Civ. App.), 43 S. W. Rep. 580.

20. *Hanlon v. Railroad Co.*, 109 Iowa, 136, 80 N. W. Rep. 223.

21. *Scott v. Railroad Co.*, 144 Ind. 125, 43 N. E. Rep. 133, 32 L. R. A. 154.

But if a railroad company sells a ticket to a passenger through such a joint agent, it cannot thereafter repudiate the contract so made on account of any subsequent disagreement between the two companies. And if a passenger is wantonly ejected in disregard of such contract rights, exemplary damages will be allowed.²²

Sec. 1064. Same subject—Where conductor on first line tears off coupon of second line.—If a ticket has separate coupons for separate connecting lines, and the conductor on the first line, without the fault or knowledge of the passenger, tears off the wrong coupon, the first line is responsible in damages to the passenger for a subsequent expulsion from the train of the second line on the refusal of its conductor to honor the remaining coupon. The second line is entitled to the presentation of a proper ticket or the payment of fare, without regard to any explanation that may be made of the fault of another company in the performance of an act in the doing of which it was not acting as the second company's agent. But that does not relieve the first company of its responsibility for the consequences of its negligence in placing the passenger in a position where he can be rightfully ejected from the second company's train.²³

Sec. 1065. (§ 580j.) Same subject—As between passenger and conductor the ticket produced must govern.—It is obvious that as between the conductor of a passenger train and a person claiming the rights of a passenger thereon, there must be some rule by which the claims of the passenger can be determined safely, speedily and conclusively; otherwise endless confusion and altercation must ensue, distracting the attention of the conductor from other duties, jeopardizing the lives of passengers and entirely demoralizing the service. Where the passenger pays his fare upon the train, a ready means is af-

22. *Cowen v. Winters*, 96 Fed. 929, 37 C. C. A. 628, *affirming* *Winters v. Cowen*, 90 Fed. 99; see also, 23. *Railroad v. Conrad*, 4 Ind. App. 640, 36 N. E. Rep. 728.

23. *Railroad v. Conrad*, 4 Ind. App. 83, 30 N. E. 406.

fording of determining his rights, but the necessities of modern traffic have made this method the exception rather than the rule, and tickets are almost universally required.

“How then,” it is said in a leading case,²⁴ “is the conductor to ascertain the contract entered into between the passenger and the railroad company where a ticket is purchased and presented to him? Practically there are but two ways—one, the evidence afforded by the ticket; the other, the statement of the passenger contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind and the benefit of a cross-examination. At common law parties interested were not competent witnesses, and even under our statute the witness is not permitted, in certain cases, to testify as to facts which, if true, were equally within the knowledge of the opposite party, and he cannot be procured. Yet here would be an investigation as to the terms of a contract, where no safeguards could be thrown around it, and where the conductor, at his peril, would have to accept the mere statement of the interested party. I seriously doubt the practical workings of such a method, except for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the traveling public generally. There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. *As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon as the evidence of his right to the seat he claims.*”²⁵ Where a passenger

24. *Frederick v. Railroad Co.*, 37, *Railroad Co.*, 56 N. Y. 295; *Petrie Mich.* 342. *v. Railroad Co.*, 42 N. J. L. 449;

25. Holding this rule are *Bradshaw v. Railroad Co.*, 135 Mass. 407; *Thomas v. Railway Co.*, 72 Mich. 355; *Cheney v. Railroad Co.*, 11 Metc. 121; *Yorton v. Railway Co.*, 54 Wis. 234; *Townsend v. Dietrich v. Railroad Co.*, 71 Penn. St. 432; *McClure v. Railroad Co.*, 34 Md. 532; *Southern, etc. R'y Co. v. Rice*, 38 Kans. 398; *Louisville, etc. R. Co. v. Fleming*, 14 Lea, 128; *Chicago, etc. R. Co. v. Bills*, 118

has purchased a ticket and the conductor does not carry him according to its terms, or if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat or pay his fare a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration'' relying upon such breach and not upon the ejection.

The application of this rule does not extend, however, to the case of a passenger who has been furnished with a ticket on its face sufficient and declared by the company's agent to be good, but which in fact was not so according to the company's regulations.²⁶ Where the ticket is apparently good and has

- Ind. 221; *Shelton v. Railway Co.*, 29 Ohio St. 214; *Downs v. Railroad Co.*, 36 Conn. 287; *Hufford v. Railway Co.*, 53 Mich. 118; *MacKay v. Railroad Co.*, 34 W. Va. 65, 11 S. E. Rep. 737; *Peabody v. Railway Co.*, 21 Oreg. 121, 26 Pac. Rep. 1053; *Pennsylvania Co. v. Lenhart*, 120 Fed. 61, 56 C. C. A. 457; *Poulin v. Railway Co.*, 52 Fed. 197, 3 C. C. A. 23, 6 U. S. App. 298, 17 L. R. A. 800, *affirming* 47 Fed. 858; *Railway Co. v. Bennett*, 50 Fed. 496, 1 C. C. A. 544, 6 U. S. App. 95; *Railroad Co. v. Deloney*, 65 Ark. 177, 45 S. W. Rep. 351, 67 Am. St. Rep. 913; *Railway Co. v. Daniels*, 90 Ill. App. 154; *Callaway v. Mellett*, 15 Ind. App. 366, 44 N. E. Rep. 198; *Ellsworth v. Railway Co.*, 95 Iowa, 98, 63 N. W. Rep. 584, 29 L. R. A. 173; *Rolfs v. Railway Co.*, 66 Kan. 272, 71 Pac. Rep. 526; *Chase v. Railway Co.*, 70 Kan. 546, 79 Pac. Rep. 153, citing *Hutch. on Carr.*; *Railroad Co. v. Jackson*, 25 Ky. L. R. 2087, 79 S. W. Rep. 1187; *Nutter v. Railway Co.*, 25 Ky. L. R. 1700, 78 S. W. Rep. 470; *Railway Co. v. Lyons*, 20 Ky. L. R. 516, 46 S. W. Rep. 209; *Spink v. Railroad Co.*, 21 Ky. L. Rep. 778, 52 S. W. Rep. 1067; *Schmidt v. Railway Co.*, 25 Ky. L. Rep. 11, 74 S. W. Rep. 674; *Railroad Co. v. Stocksdales*, 83 Md. 245, 34 Atl. Rep. 880; *Dixon v. Railroad Co.*, 179 Mass. 242, 60 N. E. Rep. 581; *Brown v. Railway Co.*, 130 Mich. 483, 90 N. W. Rep. 290; *s. c.* 134 Mich. 591, 96 N. W. Rep. 925; *Van Dusan v. Railway Co.*, 97 Mich. 439, 56 N. W. Rep. 848, 37 Am. St. Rep. 354; *Kleven v. Railway Co.*, 70 Minn. 79, 72 N. W. Rep. 828; *Mitchell v. Railway Co.*, 77 Miss. 917, 27 So. Rep. 834; *Stricker v. Railroad Co.*, 60 N. J. Law 230, 37 Atl. Rep. 776; *Parish v. Railroad Co.*, 90 N. Y. Supp. 1000, 99 App. Div. 10; *Railway Co. v. Drummond*, 73 Miss. 813, 20 So. Rep. 7; *Trice v. Railway Co.*, 40 W. Va. 271, 21 S. E. Rep. 1022; *Wiggins v. King*, 91 Hun. 340, 36 N. Y. Supp. 768; *Southern R'y Co. v. Hawkins*, — Ky. —, 89 S. W. Rep. 258.
26. *Murdock v. Railway Co.*, 137 Mass. 293; *Railroad v. Harper*, 35 So. Rep. 764, 83 Miss. 560, 102 Am.

been purchased as such in good faith by the passenger, who has no notice of the company's regulations making it invalid, he has, it is said, an absolute right to be carried accordingly; and while it would undoubtedly be prudent for him to yield to the conductor's interpretation, and leave the car to seek his remedy by action, it is yet said that he has the right to refuse to leave the car.²⁷

St. Rep. 469, 64 L. R. A. 283. Where the passenger presents a ticket which on its face entitles him to be carried, the company will not be permitted to show a custom under which it issues such tickets on certain days only, the passenger having no knowledge of the custom. *Carvey v. Railroad Co.*, 133 Mich. 659, 95 N. W. Rep. 716.

So it has been held that when, from the facts appearing on the face of the ticket and the surrounding circumstances known to the conductor, it is probable that a mistake has been made by the company in issuing the ticket, and this probability is so strong that the conductor should investigate further before ejecting the passenger, the conductor cannot regard the ticket as conclusive. The statements of the passenger, however, need not be accepted in such a case except so far as they call the conductor's attention to facts and circumstances which he can then and there observe. *Krueger v. Railway Co.*, 68 Minn. 445, 71 N. W. Rep. 683, 64 Am. St. Rep. 487; *Railway Co. v. Holmes*, 75 Miss. 371, 23 So. Rep. 187; *Railway v. Wright*, 2 Tex. Civ. App. 463, 21 S. W. Rep. 399; *Scofield v. Railroad Co.*, 112 Fed. 855, 50 C. A. 553, 56 L. R. A. 224.

27. *Railroad Co. v. Winter's*

Adm'r, 143 U. S. 60, 12 Sup. Ct. R. 356, 36 L. Ed. 71; *Railroad Co. v. Littell*, 128 Fed. 546, 63 C. C. A. 44; *Ellsworth v. Railway Co.*, 95 Iowa, 98, 63 N. W. Rep. 584, 29 L. R. A. 173; *Railroad Co. v. Rice*, 64 Md. 63, 21 Atl. Rep. 97.

In *Hufford v. Railroad Co.*, 53 Mich. 118, it appeared that on September 19, 1882, the plaintiff and one Goodyear were at Manton, on the road of defendant, and about to proceed north. They had then been together some days. At Manton they bought tickets for Traverse City from the agent of the defendant. Plaintiff noticed that the ticket given to him was not like that given to Goodyear, and he called the agent's attention to the fact, and inquired if it was good, and was told it was. In this the agent was mistaken. The ticket was one part of an excursion ticket from Sturgis to Traverse City, and had been canceled from Sturgis to Grand Rapids. The evidence is conflicting as to whether it had also been canceled from Grand Rapids to Walton, a station north of Manton. When the ticket was presented to the conductor he told the plaintiff it was not good separated from the other part. He also claimed it had been used by some other person to Walton, and he told the plaintiff he must pay his fare to Walton or he should

A few cases also go further and hold that the law does not require a person purchasing a ticket from the ticket agent to examine it and see what it purports to be, and that, though the ticket on its face is insufficient, the passenger who is ejected may recover for the ejection.²⁸ The court in Michigan,

put him off the cars. The plaintiff at first refused, and was advised by Goodyear to persist in his refusal; but when the conductor took hold of the bell-rope to stop the train, and, as plaintiff says, put his hand on plaintiff's shoulder, he consented to pay the fare, and did so, taking the conductor's receipt therefor. The fare paid was twenty-five cents. The plaintiff then proceeded on his journey.

Said the court, per Cooley, C. J.: "In *Frederick v. Marquette, etc. R. R. Co.*, 37 Mich. 342; s. c. 26 Am. Rep. 531, it was decided that, as between the conductor and the passenger, the ticket must be the conclusive evidence of the extent of the passenger's right to travel. No other rule can protect the conductor in the performance of his duties, or enable him to determine what he may or may not lawfully do in managing the train and collecting the fares. If, when a passenger makes an assertion that he has paid fare through, he can produce no evidence of it, the conductor must at his peril concede what the passenger claims, or take all the responsibilities of a trespasser if he refuses, it is easy to see that his position is one in which any lawless person, with sufficient impudence and recklessness, may have him at disadvantage, and where he can never be certain, if he performs his appar-

ent duty to his employer, that he may not be subjected to severe pecuniary responsibility. Such a state of things is not desirable, either for railroad companies or for the public. The public is interested in having the rules whereby the conductors are to govern their action certain and definite, so that they may be enforced without confusion and without stoppage of trains; and if the enforcement causes temporary inconvenience to a passenger, who by accident or mistake is without the proper evidence of his right to a passage, though he has paid for it, it is better that he submit to the temporary inconvenience than that the business of the road be interrupted to the general annoyance of all who are upon the train." See s. c. 64 Mich. 631.

28. Thus in *Georgia R. Co. v. Dougherty*, 86 Ga. 744, 12 S. E. Rep. 747, plaintiff applied to the ticket agent for a ticket from Aiken, S. C., to Atlanta, Ga., but when on the train found that her ticket was to Asheville, N. C. She stated to the conductor that her trunk had been checked to Atlanta on that ticket, which he denied, but which proved to be true. The conductor refused to recognize the ticket, and, as plaintiff had no more money, ejected her. The action was for the ejection. The court held that she was not obliged to examine her ticket

abandoning the rule at first adopted and above referred to, laid down the broad rule that when the passenger tells the conductor that he has paid his fare, and states the amount he paid to the ticket agent, who told him it was good, it is the duty of the conductor to accept the passenger's statement until he finds out it is not true, "no matter what the ticket contained in words, figures or other marks."²⁹ But the same

but might rely upon the presumption that the ticket agent had given her a proper ticket. The rule laid down in the second report of *Hufford v. Railroad Co.*, 64 Mich. 631, was cited with approval, and *Railroad Co. v. Olds*, 77 Ga. 673, was said to be substantially to the same effect. The second decision in the *Hufford Case* was also approved in *Kansas City, etc. R'y Co. v. Riley*, 68 Miss. 765, 9 S. Rep. 443.

29. *Hufford v. Railroad Co.*, 64 Mich. 631. This case is first reported in 53 Mich. 118, and the facts and the rule there laid down are stated in a preceding note. On the last appeal, Sherwood, J., said: "There seems to be no question but that the plaintiff purchased his ticket of an agent of the company, who had the right to sell the same and receive the plaintiff's money therefor; that the ticket covered the distance between the two stations, and was purchased by the plaintiff in perfect good faith; that the ticket was genuine, and was issued by the company, and one which its agents had the right to sell to passengers. The plaintiff had the right to rely upon the statements of the agent that it was good, and entitled him to a ride between the two stations. It was a contract for a ride between the two sta-

tions, that the defendant's agent had a right to make, and did make, with the plaintiff.

"The ticket given by the agent to plaintiff was the evidence agreed upon by the parties, by which the defendant should thereafter recognize the rights of plaintiff in his contract; and neither the company, nor any of its agents, could thereafter be permitted to say the ticket was not such evidence, and conclusive upon the subject. Passengers are not interested in the internal affairs of the companies whose coaches they ride in, nor are they required to know the rules and regulations made by the directors of a company for the control of the action of its agents and the management of its affairs.

"When the plaintiff told the conductor on the train that he had paid his fare, and stated the amount he paid to the agent who gave him the ticket he presented, and told him it was good, it was the duty of the conductor to accept the statement of the plaintiff until he found out it was not true, no matter what the ticket contained in words, figures, or other marks. All sorts of people travel upon the cars; and the regulations and management of the company's business and trains which would not protect the edu-

court, in the later case of *Brown v. The Railway Co.*,³⁰ adhered to the earlier rule as announced by it in the *Frederick* case, and held that, as between the conductor and the passenger, it was incumbent on the latter to produce a ticket apparently good upon its face, or else pay his fare in cash.

Sec. 1066. (§ 580k.) Same subject—But passenger is not without remedy.—But while as between the passenger and the conductor the ticket may properly be regarded as the test of the passenger's rights, yet, as between the passenger and the company, the rule is otherwise, and the former is by no means without an adequate remedy. If the passenger applies and pays for a ticket for a certain journey, there is clearly an implied contract on the part of the company that the ticket furnished is adequate and proper to enable the passenger to obtain the carriage contracted for, and that the carrier's servants will duly honor it as such. If, therefore, the carrier fails to furnish the proper ticket,³¹ or, having furnished it, if the car-

cated and uneducated, the wise and the ignorant, alike, would be unreasonable indeed. On the undisputed facts in this case, I think the plaintiff was entitled to go to Walton Junction upon the ticket he presented to the conductor. *Maroney v. Old Colony & N. R'y Co.*, 106 Mass. 153; *Murdock v. Boston & A. R. R. Co.*, 137 *id.* 293."

To the same effect are *Railroad Co. v. Fix*, 88 Ind. 381, and *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. Rep. 439, where it is held that where, by the conductor's mistake in the separation of a round-trip ticket, the return part is taken up on the going trip, the passenger has a right to return on the going part, where he has not discovered the mistake till the returning trip and then explains to the conductor of the return train how the mistake arose.

But see *Thomas v. Railway Co.*, 72 Mich. 355.

In *Scofield v. Railroad Co.*, 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224, the court laid down an especially broad rule concerning parol agreements between the ticket agents and passengers. A passenger had been given the right of stop-over at an intermediate point, but was left by the conductor of the first train, over the passenger's protest, without written evidence of his right to resume his journey from the place of stop-over, and the conductor of a later train was held to have no authority to eject the passenger.

30. 134 Mich. 591, 96 N. W. Rep. 925, 10 Det. L. N. 579.

31. *Georgia R. Co. v. Olds*, 77 Ga. 673; *Bradshaw v. Railroad Co.*, 135 Mass. 407; *Murdock v. Railroad Co.*, 137 Mass. 293; *Townsend v. Railroad Co.*, 56 N. Y. 295; *Fred-*

rier's servants refuse to honor it as such,³² or misdirect the passenger as to its use,³³ and the passenger thereby fails to procure the rights for which he paid, there is clearly a breach of the carrier's contract and the passenger may recover damages for the injury he has sustained. These damages must include compensation not only for increased expense, loss of time and inconvenience, but also for the mortification, physical and mental suffering and added indignities, if any, with which the violation of the passenger's rights may be attended.³⁴

Sec. 1067. (§ 5801.) Right of passenger to rely on instructions given him.—As will be seen,³⁵ it is the duty of the carrier

erick v. Railroad Co., 37 Mich. 342; *St. Louis, etc. R'y Co. v. Mackie*, 71 Tex. 491; *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. Rep. 439; *Railway Co. v. Street*, 26 Ind. App. 224, 59 N. E. Rep. 404; *Krueger v. Railway Co.*, 68 Minn. 445, 71 N. W. Rep. 683, 64 Am. St. Rep. 487.

Notwithstanding the fact that the declaration fails to allege damages suffered, it is not demurrable in a case where a mileage book has been refused by a conductor in payment of fare on account of the agent's mistake in inserting the purchaser's name therein, since the injured party is at least entitled to nominal damages. *Holden v. Railroad Co.*, 72 Vt. 156, 47 Atl. Rep. 403.

32. *Lake Erie, etc. R. Co. v. Fix*, 88 Ind. 381; *Philadelphia, etc. R. Co. v. Rice*, 64 Md. 63; *Pennsylvania Co. v. Lenhart*, 120 Fed. 61, 56 C. C. A. 457; *Railway Co. v. Berryman*, 11 Ind. App. 640, 36 N. E. Rep. 728.

In an action for damages for ejection from the train when the defense is that the passenger did not produce a proper ticket, it is competent for the conductor to testify that the ticket offered by

the passenger was not of the kind used by the railroad company for several months prior to the ejection, and that it was of an issue used and discontinued several years before. *Railroad Co. v. Ault*, 10 Ind. App. 661, 38 N. E. Rep. 492.

33. A passenger bought a limited ticket good only on train 1 and if passage begun at A. and continued uninterruptedly to D. He inquired of the proper official which was train 1 and showed him his ticket. The official pointed out a train which the passenger took, but which proved to be train 2, on which his ticket was not good, and he was ejected at B. and told to await train 1, which was following. When train 1 arrived at B. the station-master directed the passenger to go on board, which he did; but the conductor of train 1 also ejected him, because he had not gotten on at A. as his ticket provided. The carrier was held liable. *Elliott v. Railroad Co.*, 53 Hun, 78.

34. *Georgia R. Co. v. Olds*, 77 Ga. 673; *Southern, etc. R'y Co. v. Rice*, 38 Kan. 398; *Lake Erie, etc. R. Co. v. Fix*, 88 Ind. 381.

35. *Post*, § 1129.

to give the passenger such instructions and directions as are reasonably necessary to enable him to pursue his journey with safety and dispatch. This being so, it is obvious that the passenger is entitled to rely and act upon information or instructions given him by the carrier, or by his agent if the giving of such instructions is within the apparent scope of the latter's authority, and if the information or instructions are not manifestly erroneous or do not lead him into plain danger.³⁶ Illustrations of the right to so rely and act are found in many of the cases noticed in the preceding sections, wherein it has been held that the passenger may rely upon representations as to the sufficiency of the ticket given him by the ticket agent or conductor, or upon directions as to the train which he should take, the place at which he should alight, and the like.³⁷ Other illustrations will be found in later sections.³⁸

36. *Murdock v. Railway Co.*, 137 Mass. 293; *Hufford v. Railroad Co.*, 64 Mich. 631; *Georgia R. Co. v. Murden*, 86 Ga. 434, 12 S. E. Rep. 630; *Olson v. Railroad Co.*, 45 Minn. 536; *Wilsey v. Railroad Co.*, 83 Ky. 511; *Philadelphia, etc. R. Co. v. Rice*, 64 Md. 63; *Burnham v. Railway Co.*, 63 Me. 298; *Pennsylvania Co. v. Hoagland*, 78 Ind. 203; *Chance v. Railway Co.*, 10 Mo. App. 351; *Hardy v. Railroad Co.*, 12 N. Y. Suppl. 55; *Atkinson v. Railway Co.*, 114 Ga. 146, 39 S. E. Rep. 888, 55 L. R. A. 223; *Railway Co. v. Street*, 26 Ind. App. 224, 59 N. E. Rep. 404; *Railroad Co. v. Little*, 66 Kan. 378, 71 Pac. Rep. 820, 61 L. R. A. 122, 97 Am. St. Rep. 376; *Railroad Co. v. Harper*, 83 Miss. 560, 35 So. Rep. 764, 64 L. R. A. 283; *St. Louis, etc. R. Co. v. White*, — Tex. —, 89 S. W. Rep. 746, *reversing* (Tex. Civ. App.) 86 S. W. Rep. 71.

In *The Normannia*, 62 Fed. 469, a person desiring passage on a ship from an infected port bought

a ticket from the carrier's agent on the latter's representation that no steerage passengers would be carried. Steerage passengers were carried in fact, and cholera broke out among them on the voyage. The passenger, relying on these representations, was consequently detained in quarantine, with much inconvenience to himself. The court held the carrier liable for such inconvenience and suffering caused by the false representations of its agent.

See also, *Railroad Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. R. 356, 36 L. Ed. 71; *Robertson v. Railroad Co.*, — Ala. —, 37 So. Rep. 831; *Railroad Co. v. Roberts*, 91 Ga. 513, 18 S. E. Rep. 315.

37. *Ante*, § 1060 *et seq.* See also, *Trapp v. Railway Co.*, — S. Car. —, 51 S. E. Rep. 919; *International, etc. R. Co. v. Smith*, — Tex. Civ. App. —, 90 S. W. Rep. 709.

38. *Post*, § 1221.

But is expected that passengers will exercise ordinary intelligence and prudence, and the carrier will not be in fault, in the absence of special circumstances requiring unusual diligence, where he has used such means and given such information as would be sufficient for the needs of a traveler of ordinary intelligence using reasonable care and attention.³⁹

Neither can the carrier be bound by directions or information given by an agent in reference to a matter not within the apparent scope of his authority.⁴⁰ *A fortiori* is this so when

39. *Barker v. Railroad Co.*, 24 N. Y. 599; *Railway Co. v. Walden*, (Tex. Civ. App.) 46 S. W. Rep. 87, citing *Hutch. on Carr.*

40. *Railway Co. v. Walden*, (Tex. Civ. App.) 46 S. W. Rep. 87, citing *Hutch. on Carr.*

Statements made, or directions given, by a conductor to a passenger, on board the wrong train by his own mistake, and let off the cars away from the station at his own request, as to the course the passenger shall pursue after leaving the train, are not binding on the company because not made in reference to a matter within the scope of the conductor's authority. *Cincinnati, etc. R. Co. v. Carper*, 112 Ind. 26. "Broad as the authority of the conductor is," said the court, "it is by no means unlimited; on the contrary, it is limited to the management and control of the train committed to his care. He has authority to control the train in its movements, and it is his duty to take measures to preserve passengers from injury while getting on the train, while they are on it, and while they are alighting. In the discharge of this duty he must, as the representative of the company, exercise a high degree of care and

diligence; but when the relation of carrier and passenger terminates, the authority of the conductor as the representative of the carrier is at an end. His authority ceases when the passenger has safely alighted from the train. The company does not vest him with either apparent or actual authority beyond such as is necessary for the proper care of the persons and property placed in his charge and control. When the person who enters as a passenger has finally left the train, the conductor no longer stands to him as the representative of the carrier. His representative character does not extend to acts done after the relation of passenger and carrier has been severed. It is his duty to afford the passenger whom he directs to leave his train a safe alighting place, but he is not bound, as the representative of the company, to look after the passenger after he has left the train."

On the other hand, directions given by the conductor to a passenger as to his conduct on the train, or in getting on or off the train, would be clearly within his authority. *International, etc. R. Co. v. Gilbert*, 64 Tex. 536. The directions of the brakeman or

the passenger knows that the agent has no authority to give the directions he assumes to give.⁴¹

Sec. 1068. When passenger's ticket has been purchased for him by third person.—If a passenger's ticket has been purchased for him by a third person, and he has been accepted as a passenger and has acquired the rights incident thereto, the carrier cannot thereafter, by agreement with the third person and without the consent of the passenger, cancel his ticket and expel him from his vehicle.⁴²

14. *Limitation of carrier's liability.*

Sec. 1069. (§ 581.) Passenger carrier cannot limit his liability by notice or regulation—Conclusiveness of contract.—It has been frequently held that mere notices to the passenger are no more effectual for the purpose of limiting the liability of the passenger carrier than of the common carrier of goods, and that any regulation he may adopt, the effect or tendency of which would be to release him in the least from that utmost care and diligence which the law requires of him, whether such regulation was known to the passenger or not, would be absolutely nugatory.⁴³ But one who intends to become a pas-

other officer as to a matter intrusted to his charge, as to direct a passenger which way to go or to take a car at a given time, may be relied upon. *Chance v. Railway Co.*, 10 Mo. App. 351; *Allender v. Railroad Co.*, 43 Iowa, 276.

41. This is illustrated by the case of *Alabama, etc. R. Co. v. Carmichael*, 90 Ala. 19, 8 So. Rep. 87, 9 L. R. A. 388. There the passenger applied for a ticket on a limited train, for a certain point. The agent declined to sell her the ticket as the train did not stop at that point. She then applied to the conductor and he told her to get on without a ticket and he

would stop at that station and let her off, which he failed to do. *Held*, that she had such notice of the regulation not to stop there that she was not entitled to rely on the conductor's promise to stop, and therefore the company was not liable. See also, *Wells v. Railroad Co.*, 67 Miss. 24; *Railway Co. v. Hatton*, 60 Ind. 12; *Railway Co. v. Pierce*, 47 Mich. 277.

42. *La Gascogne*, 135 Fed. 577.

43. *Ante*, § 1052. See also, *The Majestic*, 166 U. S. 375, 17 Sup. Ct. R. 597, 41 L. Ed. 1039; *Smith v. North German Lloyd S. S. Co.*, 142 Fed. 1032; *La Bourgoyne*, — C. C. A. —, 144 Fed. 781. (These

senger may contract with the carrier in the same manner as the owner of goods, and when the contract has been put into the passenger's ticket, the same conclusive presumption exists that it is the complete and entire contract between the parties, as when the contract for the carriage of goods is contained in the carrier's receipt or bill of lading. And if the passenger has accepted from the carrier such a ticket, to be used by him as evidence of his right to be carried over the route, and in the vehicles of the carrier, he will be held to have agreed to be carried according to the contract, even though he did not read it.⁴⁴

Sec. 1070. (§ 582.) Same subject—Good faith required on part of the carrier.—The same good faith will, however, be required of the carrier in his dealings with the passenger in respect to such tickets, as is required of the common carrier of goods when he undertakes to qualify his liability by the terms of his receipt; and the ticket will be held to have the obligatory effect of a contract only when the written or printed matter, designed to vary the contract from that which would be implied by the law, is upon the face of the ticket, and so patent that it will be presumed that the passenger could have failed to see and understand it only from inattention or negligence. Consequently, if the carrier has resorted to any device to conceal it from the passenger's notice, or if he has affixed it to the ticket, whether designedly or not, in such a manner as that it would not have been probably noticed, as if it should be written or printed illegibly or unintelligibly, or upon the back of the ticket, the presumption would be that it had not been seen or understood by him, and that he had therefore never assented to it.⁴⁵

cases were all on limitations as to baggage.) See *post*, § 1299.

44. *Fonesca v. Steamship Co.*, 153 Mass. 553, 27 N. E. Rep. 665; *Railway Co. v. Nicholai*, 4 Ind. App. 119, 30 N. E. Rep. 424, 51 Am St. Rep. 206; *Rogers v. Steamboat Co.*, 86 Me. 261, 29 Atl. Rep. 1069, 25 L. R. A. 491; *Aiken v.*

Railroad Co., 80 Mo. App. 8; *Wheeler v. Nav. Co.*, 72 Hun, 5, 25 N. Y. Supp. 578; *Crory v. Railroad Co.*, 203 Pa. St. 525, 53 Atl. Rep. 363, 59 L. R. A. 815, 93 Am. St. Rep. 778.

45. *Brown v. The Railroad*, 11 Cush. 97.

Ante, §§ 415, 1052.

Sec. 1071. Same subject—When limitation inures to benefit of connecting carrier.—The same rules obtain as to connecting carriers claiming the benefit of limitations contained in a passenger's contract of through carriage as exist in the carriage of freight.⁴⁶

Sec. 1072. (§ 583.) Right of the carrier to provide against liability for injuries to the passenger from the negligence of the carrier or his servants.—The decisions of the courts as to the right of the carrier of passengers to limit his liability for the neglect of that care and circumspection which the law requires of him have followed almost the same course as those upon the right of the carrier of goods to guard himself by contract with the bailor against the consequences of his negligence; and the same diversity as to the validity of such contracts and the extent to which they may provide against the carrier's liability, when they are allowed, is to be found. But it may now be stated to be the decidedly prevailing doctrine in this country that a passenger carrier cannot contract

The contract of carriage is consummated when the passenger pays, and the carrier accepts the fare. If no special agreement be then made, the conditions of carriage are prescribed by law; and any subsequent assent by the passenger, without a separate consideration, to a limitation of the carrier's liability, is *nudum pactum*, and void. An assent by a passenger to a limitation of the carrier's liability will not be implied when such limitation is communicated to the passenger, for the first time, after he has paid his fare, and is in a situation, by the act of the carrier, which does not admit of his declining the conveyance and reclaiming his baggage. *Lechowitzer v. Packet*

Co., 28 N. Y. Supp. 577, 8 Misc. Rep. 213.

In *Bate v. Railway Co.*, (Can.) 18 S. C. R. 697, the plaintiff had sore eyes and did not read the conditions on the ticket which limited defendant's liability for baggage to wearing apparel not exceeding \$100 in value. Defendant's agent obtained plaintiff's signature to the ticket by explaining that it was merely for identification. The baggage was lost en route and was worth over \$1,000. *Held*, that the special conditions on the back of the ticket, not having been brought to plaintiff's notice, she was not bound by them and could recover from the carrier.

46. *Aiken v. Railroad Co.*, 80 Mo. App. 8. *Ante*, § 472.

against the consequences of his own negligence when the carriage of the passenger himself is the subject of the contract.⁴⁷

47. See cases on "drover's" and "employee's" passes, *ante*, §§ 1003, 1004.

See also, *Railroad Co. v. Ashley*, 67 Fed. 209, 14 C. C. A. 368, 28 U. S. App. 375; *Moses v. Packet Co.*, 88 Fed. 329; *Railway Co. v. Lippman*, 110 Ga. 665, 36 S. E. Rep. 202, 50 L. R. A. 673; *Railroad Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253, *affirming* 69 Ill. App. 363; *Railway Co. v. Teeters*, — Ind. App. —, 74 N. E. Rep. 1014; *s. c.* — Ind. —, 77 N. E. Rep. 599; *Solan v. Railway Co.*, 95 Iowa, 260, 58 Am. St. Rep. 430, 63 N. W. Rep. 692, 28 L. R. A. 718; *Railway Co. v. Martin*, 59 Kan. 437, 53 Pac. Rep. 461; *Railway Co. v. Posten*, 59 Kan. 449, 53 Pac. 465; *Railroad Co. v. Bell*, 100 Ky. 203, 38 S. W. Rep. 3; *Railroad Co. v. Scott's Adm'r*, 22 Ky. L. R. 30, 56 S. W. Rep. 674, 50 L. R. A. 381, 108 Ky. 392; *Doyle v. Railroad Co.*, 162 Mass. 66, 37 N. E. Rep. 770, 44 Am. St. Rep. 335, 25 L. R. A. 157; *Railroad Co. v. Grant*, 86 Miss. 565, 38 So. Rep. 502; *Rowdin v. Railroad Co.*, 203 Pa. St. 623, 57 Atl. Rep. 1125; *McNulty v. Railroad Co.*, 182 Pa. St. 479, 38 Atl. Rep. 524, 61 Am. St. Rep. 721, 38 L. R. A. 376; *Chatanooga Rapid Transit Co. v. Venable*, 105 Tenn. 460, 58 S. W. Rep. 861, 51 L. R. A. 886; *Railway Co. v. Rogers*, 21 Tex. Civ. App. 605, 53 S. W. Rep. 366; *Railway Co. v. Flood*, 5 Tex. Ct. R. 922, 70 S. W. Rep. 331; *Saunders v. Southern Pac. Co.*, 13 Utah, 275, 44 Pac. Rep. 932; *Williams v. Railroad Co.*, 18

Utah, 210, 54 Pac. Rep. 991, 72 Am. St. Rep. 777; *Sprigg's Adm'r v. Railroad Co.*, — Vt. —, 60 Atl. Rep. 143; *Feldschneider v. Railway Co.*, 122 Wis. 423, 99 N. W. Rep. 1034; *Davis v. Railway Co.*, 93 Wis. 470, 67 N. W. Rep. 16, 57 Am. St. Rep. 935, 33 L. R. A. 654; *Railroad Co. v. Selby*, 47 Ind. 471; *Pittsburgh, etc. R'y Co. v. Higgs*, — Ind. —, 76 N. E. Rep. 299.

The rule laid down in some cases in Illinois with reference to the carriage of goods that a carrier may by contract limit its liability for all negligence, except gross negligence, does not apply when a carrier intends to limit its liability for personal injury to a passenger paying fare or its equivalent. *Railroad Co. v. Beebe*, 174 Ill. 13, 50 N. E. Rep. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210, *affirming* 69 Ill. App. 363; *Pennsylvania Co. v. Greso*, 102 Ill. App. 252; *s. c.* 79 Ill. App. 127.

A provision of a steamship ticket exempting the carrier from its responsibility for its own or its agent's negligence, provided it has used due diligence to make the vessel seaworthy, is void as against public policy. *The Oregon*, 133 Fed. 609, 68 C. C. A. 603.

A common carrier of freight and passengers which permits passengers to be carried upon its freight trains and allows its ticket agents to sell tickets therefor, thereby makes its freight trains passenger trains to all intents and purposes and must be held to be a common carrier of passengers by

Sec. 1073. (§ 584.) Same subject—Actual payment of cash fare not necessary in order to render stipulations against liability for negligence void.—As we have already seen in preceding sections, a person is entitled to be considered a passenger for hire if a good and valuable consideration exists for his passage, even though the consideration is something else than the actual payment of cash fare,¹ as where he is carried upon a “drover’s”² or “employee’s”³ pass, or any other ticket pur-

the means so adopted. Therefore, a stipulation in a ticket sold to a passenger to the effect that, in consideration of the reduced rate at which it is issued, the passenger agrees to absolve the company from all liability as a common carrier while riding as a passenger upon its freight trains, is void as against public policy, and will not preclude a passenger who is riding upon a freight train by virtue of a ticket containing such a stipulation from recovering for an injury suffered by reason of the carrier’s negligence. *Richmond Co. v. Southern Pacific Co.*, 41 Ore. 54, 67 Pac. Rep. 947, 93 Am. St. Rep. 694, 57 L. R. A. 616.

But in *Hodge v. Railroad Co.*, 97 N. Y. Supp. 1107, it was held that where a shipper of potatoes, in consideration of his being allowed to ride on the train with the potatoes, signed a contract releasing the company from all liability for injury to his person, his administratrix could not recover for his wrongful death.

1. *Railway Co. v. Stevens*, 95 U. S. 658; *Dow v. Railway Co.*, 80 N. Y. Supp. 941, 81 App. Div. 362; *Railroad Co. v. Ashley*, 67 Fed. 209, 14 C. C. A. 368, 28 U. S. App. 375; *Nickles v. Railway Co.*, — S. Car. —, 54 S. E. Rep. 255.

2. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Pennsylvania Co. v.*

Greso, 102 Ill. App. 252, 79 Ill. App. 127; *Railroad Co. v. Beebe*, 174 Ill. 13, 50 N. E. Rep. 1019, 66 Am. St. Rep. 253, 43 L. R. A. 210, *affirming* 69 Ill. App. 363; *Railway Co. v. Teeters*, — Ind. App. —, 74 N. E. Rep. 1014; s. c. 77 N. E. Rep. 599; *Flinn v. The Railroad (Del.)*, 1 Houst. 469; *Solan v. Railway Co.*, 95 Iowa, 260, 63 N. W. Rep. 692, 58 Am. St. Rep. 430, 28 L. R. A. 718; *Railway Co. v. Martin*, 59 Kan. 437, 53 Pac. Rep. 461; *Railway Co. v. Posten*, 59 Kan. 449, 53 Pac. Rep. 465; *Railroad v. Bell*, 100 Ky. 203, 38 S. W. Rep. 3; *Weaver v. Railroad Co.*, — Mich. —, 102 N. W. Rep. 1037; *Railroad Co. v. Curran*, 19 Ohio St. 1; *Railroad Co. v. Henderson*, 51 Pa. St. 315; *Rowdin v. Railroad Co.*, 208 Pa. 623, 57 Atl. Rep. 1125; *Saunders v. Southern Pac. Co.*, 13 Utah, 275, 44 Pac. Rep. 932; *Sprigg’s Adm’r v. Railroad Co.*, — Vt. —, 60 Atl. Rep. 143; *Feldschneider v. Railway Co.*, 122 Wis. 423, 99 N. W. Rep. 1034; *Davis v. Railway Co.*, 93 Wis. 470, 67 N. W. Rep. 16; 57 Am. St. Rep. 935, 33 L. R. A. 654; *Abrams v. Railway Co.*, 87 Wis. 485, 58 N. W. Rep. 780, 41 Am. St. Rep. 55; *Maslin v. Railway Co.*, 14 W. Va. 180.

See also, cases cited under *ante*, § 1003.

See *contra*, *Duff v. Railway Co.*,

porting on its face to be a "free" pass. Such passes are, in fact, not gratuitous, and any stipulation upon them attempting to limit the carrier's liability for its own negligence or that of its agents is void by the great weight of authority. The leading case upon this subject is that of *The Railroad v. Lockwood*.⁴ This was the case of a passenger traveling under what was known as a drover's pass, in which it was agreed, as one of the mutual terms of the arrangement for carrying his cattle, that the plaintiff should take upon himself all the risk of injury to them and of personal injury to himself, and that the acceptance of the pass was to be considered a waiver of all claim for damages for injuries received on the train. Having received personal injury from the negligence of the servants of the company, he brought this suit, which was defended upon the ground that under the terms of this contract the company was released from all liability for negligence. But after an elaborate discussion of the question as to the right of the carrier, either of passengers or of goods, to provide by contract for exemption from liability for the consequences of negligence, in which the question as to each was treated as depending upon the same principle, the conclusion was reached that

L. R. (Ire.), 4 C. P. 178; *Hall v. 381; Doyle v. Railroad Co.*, 162
The Railway, L. R. 10 Q. B. 437; Mass. 66, 37 N. E. Rep. 770, 44
Gallin v. The Railway, L. R. 10 Q. Am. St. Rep. 335, 25 L. R. A. 157;
 B. 212; *McCawley v. The Railway*, s. c. 166 Mass. 492, 44 N. E. Rep.
 L. R. 8 Q. B. 57; *Bissell v. The 611; McNulty v. Railroad Co.*, 182
Railroad, 25 N. Y. 442, 29 Barb. Pa. St. 479, 38 Atl. Rep. 524, 61
 602; *Poucher v. The Railroad*, 49 Am. St. Rep. 721, 38 L. R. A. 376;
 N. Y. 263; *Meuer v. Railway Co.*, Chattanooga Rapid Transit Co. v.
 5 S. Dak. 568, 59 N. W. Rep. 945, Venable, 105 Tenn. 460, 58 S. W.
 25 L. R. A. 81, 49 Am. St. Rep. Rep. 861, 51 L. R. A. 886; *Railway*
 898 (by statute). Co. v. Flood, 5 Tex. Ct. Rep. 922,

3. *Whitney v. Railroad Co.*, 102 70 S. W. Rep. 331; *Williams v.*
 Fed. 850, 43 C. C. A. 19, 50 L. R. Railroad Co., 18 Utah, 210, 54 Pac.
 A. 615; *Carswell v. Railroad Co.*, Rep. 991, 72 Am. St. Rep. 777;
 118 Ga. 826, 45 S. E. Rep. 695; *Simmons v. Railroad Co.*, 41 Ore.
Railroad Co. v. Waggoner, 90 Ill. 151, 69 Pac. Ry. 440, 1022.

App. 556; *Railroad Co. v. Scott's*
Adm'r, 22 Ky. L. R. 30, 56 S. W.
 Rep. 674, 108 Ky. 392, 50 L. R. A.

See also, cases cited in § 1004.

4. 17 Wall. 357.

a contract, the object of which was to relieve the carrier, whether of passengers or of goods, from responsibility for the negligence of himself or of his servants, was neither just nor reasonable in law, and that the reasons for this conclusion applied with special force to the case of the carrier of passengers. The contract, therefore, so far as it undertook to affect the liability of the carrier for negligence in the carriage of the passenger, was declared to be totally void, and the defense was disallowed.

Such contracts, however, have been sustained as to persons not passengers but lawfully upon the train, as, for instance, express messengers,⁵ sleeping car porters,⁶ and news agents.⁷

Sec. 1074. (§ 585.) Same subject—No distinction made in these cases as to degree of negligence.—In *The Railroad v. Lockwood*,⁸ and in several of the cases upon this subject, it is said that in cases of the kind no distinction can be made between the degrees of negligence; and any neglect to exercise the reasonable care and diligence which the mode of carriage and the circumstances make necessary for the safety of the

5. *Baltimore & Ohio Ry. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. R. 385, 44 L. Ed. 560; *Railway Co. v. O'Brien*, 132 Fed. 593, 67 C. C. A. 421, reversing 116 Fed. 502; *Long v. Railroad Co.*, 130 Fed. 870, 65 C. C. A. 354; *Kelly v. Malott*, 135 Fed. 74, 67 C. C. A. 548; *Blank v. Railroad Co.*, 182 Ill. 332, 55 N. E. Rep. 332, affirming 80 Ill. App. 475; *Railway Co. v. Keefer*, 146 Ind. 21, 44 N. E. Rep. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348; *Railway Co. v. Mahony*, 148 Ind. 196, 46 N. E. Rep. 917; *Railroad Co. v. Wallace*, 66 Fed. 506, 14 C. C. A. 257, 24 U. S. App. 589, 30 L. R. A. 161; *Bates v. Railroad Co.*, 147 Mass. 255, 17 N. E. Rep. 633; *Hosmer v. Railroad Co.*, 156 Mass. 506, 31

N. E. Rep. 652; *Peterson v. Railway Co.*, 119 Wis. 197, 96 N. W. Rep. 532, 100 Am. St. Rep. 879.

6. *Railway Co. v. Hamler*, 215 Ill. 525, 74 N. E. Rep. 705; *Russell v. Railway Co.*, 157 Ind. 305, 61 N. E. Rep. 678, 87 Am. St. Rep. 214, 55 L. R. A. 253.

Contra, *Jones v. Railway Co.*, 125 Mo. 666, 28 S. W. Rep. 883, 26 L. R. A. 718, 46 Am. St. Rep. 514.

7. *Alexander v. Railway Co.*, 33 Up. Can. 474; *Griswold v. Railroad Co.*, 53 Conn. 371.

Contra, *Starr v. Railway Co.*, 67 Minn. 18, 69 N. W. Rep. 632; *Railway Co. v. Fenwick* (Tex. Civ. App.), 78 S. W. Rep. 548.

8. 17 Wall. 357.

passenger will be considered as negligence against responsibility for which it would be unreasonable to permit the carrier to contract. How far the passenger may, by an express contract, dispense with that utmost care and diligence which are the measure of the carrier's duty to the passenger, or whether he can by the most solemn contract do so to any extent whatever, seems not to be distinctly affirmed. The reasonable conclusion, however, from the language employed in these cases is that such contracts are utterly futile for any purpose or to any extent whatever.

Sec. 1075. (§ 586.) Rule where free passes are issued on condition of no liability.—But a difference in the degrees of negligence has been recognized by some courts in cases involving free passes issued on condition of no liability, and such a stipulation against liability is permitted to have effect except when the negligence in the particular instance is not of the kind denominated as gross or wilful.⁹ In view of the trend of modern decisions, however, toward abolishing all degrees of negligence those cases cannot be accepted as authoritative in other jurisdictions.

Owing to the presence of statutes in some states, their courts have held that it is against public policy to allow a carrier of passengers to contract against liability for damages arising in consequence of his own negligence, even though the passenger is riding on a free pass expressly conditioned against liability.¹⁰ But even in such states it is recognized that a person riding on a pass issued contrary to the provisions of a state

9. *Rose v. The Railroad*, 39 (unofficial) 607, 89 N. W. Rep. Iowa, 246; *Railroad Co. v. Mundy*, 643; *Railway Co. v. Flood* (Tex. Civ. App.), 79 S. W. Rep. 1106; 21 Ind. 48; *Jacobus v. The Railroad*, 20 Minn. 110; *Farmers' Loan & Trust Co. v. Railway Co.*, 102 App. 605, 53 S. W. Rep. 366; *Railway Co. v. Farmer*, 100 Va. 379, Fed. 17.

10. *Railroad Co. v. Grant*, 86 41 S. E. Rep. 721; *Bryan v. Railway Co.*, 32 Mo. App. 228; *Railway Co. v. McGown*, 65 Tex. 640. Miss. 565, 38 So. Rep. 502; *Young v. Railway Co.*, 93 Mo. App. 267; *Railroad Co. v. Hannibal*, 2 Neb.

statute cannot recover for injuries received through the negligence of the carrier.¹¹

In the great majority of states it is held that when the carrier receives no compensation for the carriage from the passenger, but carries him gratuitously, as upon a free pass, he may lawfully contract with the passenger that the latter will take upon himself all the risk of personal injury from the negligence of the agents or servants of the carrier for which the carrier would otherwise be liable.¹² Nor is it material whether the person reads the conditions on the pass or not, for, by accepting it, he will be deemed to have accepted the conditions on which it was issued.¹³ But such limitations of liability will not ordinarily be binding on an infant where the transportation is procured by a parent, for the agreement is then the agreement of the parent and not of the child.¹⁴ And, in all cases, such contracts, to be effectual, must be expressed in unequivocal terms.¹⁵

11. *McNeill v. Railroad Co.*, 132 N. Car. 510, 44 S. E. Rep. 34, 95 Am. St. Rep. 641; *s. c.* 135 N. Car. 682, 47 S. E. Rep. 765.

12. *Railway Co. v. Adams*, 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. R. 408, *reversing* 116 Fed. 324, 54 C. C. A. 196; *Boering v. Railway Co.*, 193 U. S. 442, 48 L. Ed. 742, 24 Sup. Ct. R. 515, *affirming* 20 App. D. C. 500; *Duncan v. Railway Co.*, 113 Fed. 508; *The Stella*, L. R. (1900) P. 161, 81 Law T. (N. S.) 235, 69 L. J. P. 70; *Railway Co. v. Franchere* (Can.), 35 S. C. R. 68; *Holly v. Railway Co.*, 119 Ga. 767, 47 S. E. Rep. 188; *Ill. Cent. R. Co. v. Read*, 37 Ill. 484; *Payne v. Railroad Co.*, 157 Ind. 616, 62 N. E. Rep. 472, *vacating judgment of* Ind. App. in 60 N. E. Rep. 362; *Rogers v. Steamboat Co.*, 86 Me. 261, 29 Atl. Rep. 1069, 25 L. R. A. 491; *Quim-*

by v. Railroad Co., 150 Mass. 365; *Kinney v. Railroad Co.*, 32 N. J. Law 407; *Wells v. The Railroad Co.*, 26 Barb. 611, 24 N. Y. 181; *Perkins v. The Railroad*, 24 N. Y. 196; *Muldoon v. Railway Co.*, 10 Wash. 311, 38 Pac. Rep. 995, 22 L. R. A. 794, 45 Am. St. Rep. 995; *s. c.* 7 Wash. 528, 35 Pac. Rep. 442, 38 Am. St. Rep. 901.

One who has a free pass does not become a passenger for hire by purchasing a ticket for a seat in a drawing-room car. *Ulrich v. Railroad Co.*, 108 N. Y. 80.

13. *Quimby v. Railroad Co.*, *supra*; *Boering v. Railroad Co.*, *supra*.

14. *Railway Co. v. Lee*, 92 Fed. 318, 34 C. C. A. 365; *s. c.* 76 Fed. 212, 22 C. C. A. 132, 40 U. S. App. 298; *Flower v. Railway Co.*, (1894) 2 Q. B. 65, 63 L. J. Q. B. 547.

15. *Kenney v. Railroad Co.*, 125

Sec. 1076. Carrier may enter into contract of indemnity with insurance company.—While the carrier of passengers cannot, by contract, restrict, diminish or limit its obligation to the public or that duty to the passenger which requires the exercise of the highest degree of care and skill, there is no reason of public policy which prohibits him from entering into a contract of indemnity against damages for injuries caused to passengers, and such a contract is not invalid though covering losses resulting from its own negligence or the negligence of its servants. Such insurance does not diminish the carrier's own responsibility, but rather increases the means of meeting that responsibility to the person injured.¹⁶

15. *Regulations of the carrier.*

Sec. 1077. (§ 587.) The passenger must conform to the reasonable regulations of the carrier, and may be ejected for refusal.—The passenger takes his ticket always with the understanding that he will conform to the reasonable regulations of the carrier as to the conduct of the carriage; and it has been held that an obedience to such regulations is a condition of the contract to carry, though not expressed in the contract or known to the passenger;¹⁷ and for a persistent refusal to com-

N. Y. 422; *Dow v. Railway Co.*, 80 N. Y. Supp. 941, 81 App. Div. 362.

16. *Baltimore, etc., Railroad v. Mercantile Trust & Deposit Co.*, 82 Md. 535, 34 Atl. Rep. 778, 38 L. R. A. 97; *Railroad Co. v. Southern Ry. News Co.*, 151 Mo. 373, 52 S. W. Rep. 205, 45 L. R. A. 380.

17. *Railway Co. v. Watson*, 110 Ga. 681, 36 S. E. Rep. 209, citing *Hutch. on Carr.*; *Railway Co. v. Rielly*, 40 Ill. App. 416; *State v. Railway Co.*, 84 Md. 163, 34 Atl. Rep. 1130; *Decker v. Railroad Co.*, 3 Okl. 553, 41 Pac. Rep. 610; *Penn. Co. v. Parry*, 55 N. J. Law 551,

27. Atl. Rep. 914, 22 L. R. A. 251, 39 Am. St. Rep. 654; *Wood v. Railroad Co.*, — N. J. Law —, 63 Atl. Rep. 867.

Regulations that passengers shall use only one seat if the car is not crowded, or half a seat if crowded, or that the backs of seats shall not be turned so as to face each other, or that passengers shall not place baggage on the seats in front of them are reasonable. *Railway Co. v. Moody* (Tex. Civ. App.), 30 S. W. Rep. 574.

A rule that baggage shall not be checked until a ticket has been procured is a reasonable regula-

ply with them, the carrier may resort to the necessary force to remove the passenger from his conveyance. In resorting, however, to this extreme measure, the carrier assumes the responsibility of the reasonableness of the regulation, and if it should be held to be unreasonable, he will have acted without authority, and will be liable in damages to the passenger.¹⁸ He has

tion to prevent imposition upon the company. *Coffee v. Railroad Co.*, 76 Miss. 569, 25 So. Rep. 157, 45 L. R. A. 112, 71 Am. St. Rep. 535.

Extra charges may lawfully be made for admittance to chair cars. *Railway Co. v. Hardy*, 55 Ark. 134, 17 S. W. Rep. 711.

A regulation that passengers will not be allowed to act as express messengers is reasonable. *Runyan v. Railroad Co.*, 65 N. J. L. 228, 47 Atl. Rep. 422; s. c. 61 N. J. L. 537, 41 Atl. Rep. 367, 43 L. R. A. 284, 68 Am. St. Rep. 711; s. c. 64 N. J. L. 67, 44 Atl. Rep. 985, 48 L. R. A. 744.

A rule that passengers shall not enter the passenger coaches of a train upon which they have obtained the right to ride earlier than thirty minutes before the time of starting is reasonable. *Decker v. Railroad Co.*, 3 Okl. 553, 41 Pac. Rep. 610.

A regulation that the conductor of a suburban train should not permit passengers to go past him into that part of the train where he had completed his collection until all collections had been made, unless such passengers should present a ticket or had already paid their fares, is reasonable. *Faber v. Railway Co.*, 62 Minn. 433, 64 N. W. Rep. 918, 36 L. R. A. 789.

Regulations excluding dogs from passenger cars or requiring them

to be carried in baggage cars are reasonable. *Gregory v. Railway Co.*, 100 Iowa, 345, 69 N. W. Rep. 532; *Butler v. Railroad Co.*, 87 Hun, 10, 33 N. Y. Supp. 845; *O'Gorman v. Railway Co.*, 89 N. Y. Supp. 589, 96 App. Div. 594.

A regulation that passengers with packages too large to be carried in the lap shall pay extra fare is reasonable. *Morris v. Railroad Co.*, 116 N. Y. 552. So is one that passengers shall not stand on car platform. *Graville v. Railroad Co.*, 105 N. Y. 525.

A rule against carrying packages of merchandise or groceries into the car may be enforced by the carrier unless there is an existing general usage to the contrary. *Runyan v. Railroad Co.*, 65 N. J. Law 228, 47 Atl. Rep. 422; s. c. 61 N. J. Law 537, 41 Atl. 367, 68 Am. St. Rep. 711, 43 L. R. A. 284; s. c. 64 N. J. Law 67, 44 Atl. Rep. 985, 48 Atl. Rep. 744; *Railroad Co. v. Bullock*, 60 N. J. Law 24, 36 Atl. Rep. 773, 37 L. R. A. 417.

A railroad company operating two lines of road between two points, one direct and the other indirect, may adopt a regulation requiring passengers, traveling upon a single contract to carry from one point to the other, to go by the most direct route. *Church v. Railway Co.*, 6 S. Dak. 235, 60 N. W. Rep. 854, 26 L. R. A. 616.

18. *Railroad Co. v. Turner*, 100

no right, arbitrarily, to adopt rules or regulations for which there is no occasion, and which may unnecessarily subject the passenger to inconvenience or danger, and to undertake their enforcement by his forcible expulsion. Nor can he lawfully eject or refuse to carry the passenger, especially after the carriage has been commenced, because of a violation of an unessential rule; nor can he claim this right because the regulation itself provides that such shall be the penalty for its violation. *A fortiori* he cannot, by regulations or usages not known to the passenger, deprive the latter of rights conferred upon him

Tenn. 213, 47 S. W. Rep. 223, 43 L. R. A. 140.

A regulation that passengers shall not board the train until a few minutes before the train leaves is not binding upon a passenger who has no actual notice of such a regulation, there being no notice to that effect posted about the station and the servants of the carrier not having brought it to the attention of the passenger. *Railroad Co. v. Herold*, 74 Md. 510, 22 Atl. Rep. 323, 14 L. R. A. 75.

A regulation that passengers shall not wear the uniform cap of a line of steamers running in opposition to those with which the carrier connects is not reasonable. *South Fla. R. Co. v. Rhodes*, 25 Fla. 40.

A rule that a baggage master shall not receive baggage into the baggage room until a ticket shall have been procured is unreasonable and void. *Coffee v. Railroad Co.*, 76 Miss. 569, 25 So. Rep. 157, 71 Am. St. Rep. 535, 45 L. R. A. 112.

A passenger is not bound to take notice of a rule or regulation which contravenes the law. *Rob-*

inson v. Railroad Co., 105 Cal. 526, 541, 38 Pac. Rep. 94, 108, 722, 28 L. R. A. 773.

Nor is a void order of a state board of health, in obedience to which a passenger is expelled from the train, a defense in an action for damages by the passenger for wrongful expulsion. *Wilson v. Railroad Co.*, 77 Miss. 714, 52 L. R. A. 357, 28 So. Rep. 567.

Rules promulgated by a railroad company do not necessarily limit the duty of a station agent towards the public about the station grounds to what is prescribed therein, nor do they necessarily fully describe the duties which the law imposes upon the agents of the corporation at the railway station. *Railroad Co. v. Hyde*, 101 Fed. 401, 41 C. C. A. 549.

A regulation in a passenger ticket which provides that in case of doubt on the part of the carrier's agent, as to the ticket entitling the passenger to ride, the passenger shall pay the conductor's claim and take a receipt and report to the general passenger agent, is void because unreasonable. *Cherry v. Railroad Co.*, — Mo. —, 90 S. W. Rep. 381.

by his ticket, which contained no notice of such limitations.¹⁹

Where the facts are not disputed, the question whether or not a rule or regulation is reasonable, is a question of law for the court.²⁰

Sec. 1078. (§ 588.) Same subject.—The courts, both in this country and in England, have gone very far in sustaining the regulations of carriers of passengers by railway for reasons peculiar to that mode of carriage. “Transportation by railway,” it was said in *Hibbard v. The Erie Railroad Company*,²¹ “is one of the highest efforts of science and art, and imposes upon those employed in it a degree of care, circumspection and diligence unknown to other modes of conveyance. It implies also a degree of authority in the direction and management of the trains in their progress over the road, and in regard to the time and manner in which passengers shall enter and depart from, and the conditions upon which they are to remain within, the cars, little less than absolute. Such regulations as will enable a railroad corporation to execute its difficult and responsible duties, insure the comfort and safety of its passengers, and protect itself from wrong and imposition, it has an undoubted right to prescribe, provided such regulations are reasonable and just.”

Sec. 1079. (§ 589.) Same subject.—The necessity for promptness in the movements of their trains has also been held to justify the enforcement of their rules and regulations as to passengers with a decision and firmness which would not, perhaps, be altogether approved in the management of their business by carriers by other modes of conveyance. On this ground it was held in the same case that when the passenger had for-

19. *Maroney v. Railway Co.*, 106 Mass. 153.

20. *Railway Co. v. Watson*, 110 Ga. 681, 36 S. E. Rep. 209; *Railway Co. v. Motes*, 117 Ga. 923, 43 S. E. Rep. 990, 62 L. R. A. 507, 97 Am. St. Rep. 223; *Gregory v. Railway Co.*, 100 Iowa, 345, 69 N.

W. Rep. 532; *State v. Railway Co.*, 84 Md. 163, 34 Atl. Rep. 1130; *O’Gorman v. Railway Co.*, 89 N. Y. Supp. 589, 96 App. Div. 594; *Pullman Co. v. Krauss*, — Ala. —, 40 So. Rep. 398.

21. 15 N. Y. 455.

feited his right to be carried further by a refusal to exhibit his ticket to the conductor when its exhibition was demanded, and the signal had been given to stop the train for the purpose of removing him from it, he could not regain his right to be carried on by then exhibiting it, and that the conductor was justified in persisting, notwithstanding its exhibition after he had given the signal for stopping the train, in ejecting him. "This question," said Denio, C. J., "requires a consideration of the peculiar character of this new mode of transporting persons. Railroad trains are run according to a scheme in which the time required in passing from one point to another, and the time required for the necessary stoppages, is accurately calculated. Any derangement or departure from the time fixed is exceedingly hazardous to the safety of the company's property and to the lives of the passengers and the persons employed in running the train. The most horrible calamities have often been the result of such derangements. A train of railroad cars cannot be stopped, and again set in motion so as to attain its former speed, without considerable delay; and if one passenger by his unjustifiable humor can cause the cars to stop, another may do the same thing, and the utmost irregularity may be brought about. The rule was, therefore, in my judgment, plainly reasonable which imposed a forfeiture of his right to proceed further in the cars upon a person who should refuse to show his ticket to a conductor when requested. Having forfeited his right by his conduct, it was for the company or its agents to say whether he should be retained after having occasioned the inconvenience of a stoppage by his pertinacity." And this may be considered a well-established rule.¹ But though for such breach of his im-

1. *State v. Thompson*, 20 N. H. 24, 1877); *Nelson v. The Railroad*, 250; *State v. Campbell*, 3 Vroom, 7 Hun, 140; *Railroad Co. v. Holden*, 66 Ark. 602, 53 S. W. Rep. 309; *O'Brien v. The Railroad*, 15 Gray, 20; *Stone v. The Railroad* (Iowa S. C.), 5 Central Law Journal, 477 (reported in full in 10 R. A. 53, citing *Hutch. on Carr.* Chicago Legal News, 78, November

plied contract to obey the regulations of the carrier he may be excluded from that particular train, the company cannot, for the same offense, prohibit him from going on another train.²

Sec. 1080. Regulation of carrier may be waived by usage—Authority of an agent to waive.—But the carrier may, by recognizing a custom or usage which is contrary to the provisions of a regulation, estop himself from claiming the benefit of the regulation. To entitle the passenger to rely upon such a usage, however, it must appear that the usage was so general, certain and uniform that the conclusion can reasonably be reached that the officers and agents of the carrier possessed knowledge of the same, and acquiesced therein to such an extent that the parties can reasonably be presumed to have contracted with reference to it. The proof of such a usage must not only be clear and explicit, but it must also be distinguished from mere acts of accommodation. The mere fact that such acts of accommodation have been constantly permitted by the servants of the carrier, not in obedience to duty or contract, but as a matter of form and indulgence, cannot compel their continuance, and such mere accommodation may be discontinued at any time.³ So in order that a regulation of the carrier may be said to be waived through the conduct of an agent or employe, such agent or employe must have been acting within the apparent scope of his authority. Thus, a brakeman cannot waive a regulation of the carrier that passengers shall not ride upon the platforms of express cars.⁴

Sec. 1081. Carrier liable if wrong person expelled for breach of regulations.—While the carrier may eject a passenger who is violating its reasonable rules and regulations, there

2. *State v. Campbell, supra.*

3. *Runyan v. Railroad Co.*, 65 N. J. Law 228, 47 Atl. Rep. 422; *s. c.* 64 N. J. Law 67, 44 Atl. Rep. 985, 48 L. R. A. 744; *s. c.* 61 N. J. Law 537, 41 Atl. Rep. 367, 43 L. R. A. 284, 68 Am. St. Rep. 711; Rail-

road Co. *v. Bullock*, 60 N. J. Law 24, 36 Atl. Rep. 773, 37 L. R. A. 417.

4. *Railroad Co. v. Field*, 7 Ind. App. 172, 34 N. E. Rep. 406, 52 Am. St. Rep. 444.

will be no justification for so doing, even though the carrier's servants believed, or had reasonable grounds to believe, that he was violating its rules, if the passenger was not in fact guilty of the supposed violation. The carrier must be held to judge at its peril as to the application of a rule in a particular case, and, if it errs, it will be answerable for its mistakes, or or those of its servants while acting under its authority.⁵

16. *Ejection of passenger for breach of regulations.*

Sec. 1082. (§ 590.) At what place passenger may be ejected.—It has been held that the passenger who refuses to obey a reasonable regulation of the carrier forfeits his right to be carried, and at once puts himself in the condition of an intruder, and may be ejected at any point upon the carrier's route at which he may choose to put him off; and that the railway carrier, unless the rule be changed by statute, need not delay his removal until its train comes to a station, but may stop the train and expel him at once.⁶ This rule is, however, changed by statute in many states, and the passenger may only be ejected at a regular stopping place or opposite a dwelling-house.⁷ And though, by the common law, a carrier, it is said,

5. *Railway Co. v. Osborn*, 67 Ark. 399, 55 S. W. Rep. 142.

6. *Great Western Ry. v. Miller*, 19 Mich. 305; *McClure v. The Railroad*, 34 Md. 532; *Ohio, etc., R. R. v. Muhling*, 30 Ill. 9; *Illinois, etc., R. R. v. Whittemore*, 43 *id.* 420; *Wyman v. Railroad Co.*, 34 Minn. 210; *Lillis v. Railroad Co.*, 64 Mo. 464; *O'Brien v. Railroad Co.*, 15 Gray, 20; *Brown v. Railroad Co.*, 51 Iowa, 235; *Rudy v. Railway Co.*, 8 Utah, 165, 30 Pac. Rep. 366.

Where there is no statute to the contrary, a passenger liable to ejection who asks to be put off near the station from which he

started should be there put off. *Hall v. Railway Co.*, 28 S. C. 261.

After the right to eject an unruly passenger has been exercised and the passenger put off the train, the carrier will not be liable when such person attempts to again board the train, and, in doing so, falls and is injured. *Railway Co. v. Saulsberry*, 112 Ky. 915, 66 S. W. Rep. 1051, 56 L. R. A. 580.

7. See *Toledo, etc., R. Co. v. Wright*, 68 Ind. 586; *Texas, etc., R. Co. v. Casey*, 52 Tex. 112; *Hobbs v. Railway Co.*, 49 Ark. 357; *South Florida R. Co. v. Rhodes*, 25 Fla. 40; *Baldwin v. Railway Co.*,

is not required to put out a trespasser at one place rather than another, yet the law will not permit a person to be exposed wantonly to perils.⁸ There is, however, no rule which requires any consideration to be shown for the mere convenience of a wrong-doer; otherwise, such companies would be subject to imposition by being compelled to carry persons from station to station without compensation. But while this should be the general rule, there may be circumstances under which such a course would be unjustifiable, and would subject the carrier to liability to damages to the person thus treated; as where the passenger having a ticket had accidentally lost or mislaid it, and not being able to show it when called upon by the conductor, in conformity with a regulation of the company, was ejected without being afforded an opportunity to find it,⁹ or where a passenger to whom no seat can be furnished, and who therefore refuses to give up his ticket, is ejected at a dangerous place.¹⁰

In England, however, the power to eject for non-performance of a regulation, as to produce a ticket or pay fare, does not exist in the absence of some statute or valid by-law or agreement conferring it.¹¹

Sec. 1083. Same subject—Ejection of females and sick or intoxicated passengers.—But even in the absence of a statute, regard must be had for the age, sex and condition of the passenger, and the surrounding circumstances, such as the state of

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| <p>64 N. H. 596; Wright v. Railway Co., 78 Cal. 360; Terre Haute R. v. Vanatta, 21 Ill. 188; Ill. Cent. R. R. v. Latimer, 128 Ill. 163; Nelson v. The Railroad, 7 Hun, 140; Hill v. The Railroad, 63 N. Y. 101; Railway Co. v. Lewis, 69 Ark. 81, 61 S. W. Rep. 163; Railroad Co. v. Harper, 69 Ark. 186, 61 S. W. Rep. 911, 53 L. R. A. 220, 86 Am. St. Rep. 190; Holt v. Railway Co., 174 Mo. 524, 74 S. W. 631, 87 Mo. App. 203; Durfee v. Railway Co., 9 Utah, 213, 33 Pac.</p> | <p>Rep. 744; Nichols v. Railway Co., 7 Utah, 510, 27 Pac. Rep. 693; Boehm v. Railway Co., 91 Wis. 592, 65 N. W. Rep. 506; Phettipiece v. Railroad Co., 84 Wis. 412, 54 N. W. Rep. 1092, 20 L. R. A. 483.</p> <p>8. See following section.</p> <p>9. Maples v. The Railroad, 38 Conn. 557.</p> <p>10. Hardenbergh v. Railway Co., 39 Minn. 3.</p> <p>11. Butler v. Railway Co., L. R. 21 Q. B. D. 207.</p> |
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the weather, the time of day, the condition of the country, etc., for he must not be ejected at an unreasonably unsuitable place or time. The question of the suitability of the time and place is therefore ordinarily one for the jury.¹² Female passengers,¹³ and passengers who are sick or suffering from some mental or physical infirmity,¹⁴ necessarily cannot be ejected at times and places where the carrier should know that their sex or condition would especially expose them to insult or injury. And this rule is true whether the attendant danger arises from the natural infirmity of the person or was self-imposed. Thus, if a person on a train is so intoxicated as to render him unconscious of danger and unable to appreciate his position, surroundings and perils, and his duty to avoid them, or he does not possess the power of locomotion, and is put off the train by a conductor on account of his misconduct, and the place where he is put off and left is dangerous to one in his condition, and these facts are known to the conductor, he would be guilty of recklessness and wanton negligence, rendering the company, in whose employment he is, liable for damages resulting from his negligence, although the person ejected and injured might

12. See *Hall v. Railway Co.*, 28 S. C. 261; *Illinois, etc., R. Co. v. Latimer*, 128 Ill. 163; *Louisville, etc., R. Co. v. Sullivan*, 81 Ky. 624; *Brown v. Railroad Co.*, 51 Iowa, 235; *Toledo, etc., R. Co. v. Wright*, 68 Ind. 586; *Chicago, etc., R. Co. v. Parks*, 18 Ill. 460; *Brown v. Railroad Co.*, 51 Iowa, 238, 1 N. W. Rep. 487; *Rudy v. Railway Co.*, 8 Utah, 165, 30 Pac. Rep. 366.

13. *Jackson v. Railway Co.*, 76 Miss. 703, 25 So. Rep. 353.

In *Sira v. Railway Co.*, 115 Mo. 127, 21 S. W. Rep. 905, 37 Am. St. Rep. 386, the conductor ejected a female passenger, 17 years of age, at a station short of her destination because, by the carrier's rules, the train did not stop

at her destination. She knew no one at such station. A male passenger, who also alighted at the same station, offered to escort her to an hotel nearby, but instead, decoyed her into a saloon where he committed a rape upon her. There was no evidence that the station was an unsafe or inappropriate one for a youthful and inexperienced female to remain at between trains. The court held that there being no proof that the conductor knew or had reason to believe that such male passenger intended to assault her, the carrier was not liable for her ejection at that station.

14. *Eidson v. Railway Co.*, — Miss. —, 23 So. Rep. 369.

have been legally ejected in a proper manner and at a proper place.¹⁵ But in order to subject the company to liability for such act, the condition of the person so ejected must be such that it would reasonably indicate to the carrier's servants that he, on account of his condition and the surrounding circum-

15. *Railroad Co. v. Johnson*, 108 Ala. 62, 19 So. Rep. 51, 31 L. R. A. 372; *s. c. Johnson v. Railroad Co.*, 104 Ala. 241, 16 So. Rep. 75, 53 Am. St. Rep. 39; *s. c. Railroad Co. v. Johnson*, 92 Ala. 204, 9 So. Rep. 269, 25 Am. St. Rep. 35; *Railroad Co. v. Ellis' Adm'r*, 97 Ky. 330, 30 S. W. Rep. 979; *Delahanty v. Railway Co. (Can.)*, 7 Ont. L. R. 690; *Atchison, etc., R. Co. v. Weber*, 33 Kan. 543; *Louisville, etc., R. Co. v. Sullivan*, 81 Ky. 624; *Cincinnati, etc., R. Co. v. Cooper*, 120 Ind. 469.

In *Haug v. The Railway*, 8 N. Dak. 23, 77 N. W. Rep. 97, 42 L. R. A. 664, it appeared that the passenger, while helplessly intoxicated, of which fact the defendant's employees had notice, was carried beyond his destination. When the train reached the next station, extra fare was demanded of him, and, on his refusal to pay it, he was compelled to leave the train. It was late at night and the weather was stormy and dangerously cold. At the station where he was put off there were no accommodations except the defendant's depot. He entered the depot to await a train which would carry him back to his destination, but was shortly afterwards ejected therefrom by the depot-agent, who closed the depot for the night. The depot-agent knew of his purpose in being in the depot, and also of his intoxicated condition. In attempting to

return by foot to the next station where shelter could be found, he succumbed to the cold and later died from the exposure. It was held that while the defendant was not bound to keep its depot open at all hours of the day or night, yet that, where the passenger was negligently carried beyond his destination, it was bound in view of the climatic conditions and the non-existence of shelter except in its depot, to decide whether it would leave him in the depot or carry him further to another place of safety; that where once it determined to put him off at the depot, there sprung up the obligation not to take from him the only shelter the place afforded. "His intoxication," said the court, "was not the proximate cause of his death. It was, it is true, the cause of the defendant being required to exercise greater precaution as to the place of his removal from the train than if he had been sober. The man who voluntarily incapacitates himself by drink is not, on that account, an outlaw. . . . When the carrier discovers that one helpless from intoxication is upon its train without right, it must, in selecting a safe place to put him off, have regard to his actual condition, physical and mental, without any reference to his responsibility for such condition. The law declares to the carrier that it shall not expose him

stances, would be liable to injury by being left at the place where ejected.¹⁶

Where, however, a drunken person has been carried to his destination, or ejected in a proper manner, and there placed in a position of safety, the carrier is not liable if he afterwards wanders back upon the track and is injured or killed.¹⁷

Sec. 1084. The right to eject must be exercised in a proper manner.—And in general it may be said that, while the carrier may not be required to pay regard to the mere convenience of the passenger, when he has forfeited his right to be carried by his misconduct or refusal to comply with his regulations, he cannot eject him in such a manner as to endanger his safety, as by ejecting him while the train is in motion or in a dangerous place, without making himself liable for the consequences.¹⁸ Nor can he use more force than may be necessary, and if he re-

to great peril, even in exercising its undoubted right to eject him, and, in deciding whether he will be subjected to peril, not only must climatic conditions, the proximity of shelter, and other matters be taken into account, but also the actual state of his mind and bodily health and strength, if known to the agent of the carrier. . . . The proximate cause of the deceased's death was the wanton act of the defendant's agent in unnecessarily exposing him in a state of helpless intoxication to the cold and storm of a bitter wintry night." The order of the lower court sustaining a demurrer to the petition was therefore reversed.

16. *Tuttle v. Railway Co.*, 80 S. W. Rep. 802, 26 Ky. L. Rep. 152; *Railroad Co. v. Johnson*, *supra*; *Roseman v. Railroad Co.*, 112 N. Car. 709, 34 Am. St. Rep. 524, 16 S. E. Rep. 766, 19 L. R. A. 327.

17. *Railroad Co. v. Hawkins*, 92

Ala. 241, 9 So. Rep. 271; *Railroad Co. v. Logan*, 88 Ky. 232, 10 S. W. Rep. 655, 21 Am. St. Rep. 332; *Nash v. Railway Co.*, 136 Ala. 177, 33 So. Rep. 932, 96 Am. St. Rep. 19; *Brown's Adm'r v. Railroad Co.*, 19 Ky. L. R. 1873, 44 S. W. Rep. 648; *Gaulkler v. Railway Co.*, 130 Mich. 666, 90 N. W. Rep. 660; *McClelland v. Railway Co.*, 94 Ind. 276; *Missouri Pac. Ry. Co. v. Evans*, 71 Tex. 371; *Railway Co. v. Valleley*, 32 Ohio St. 345.

18. *State v. Kinney*, 34 Minn. 311; *Brown v. Railroad Co.*, 66 Mo. 588; *Gulf, etc., R. Co. v. Kirkbride*, 79 Tex. 459, 15 S. W. Rep. 495; *Fell v. Railroad Co.*, 44 Fed. Rep. 248; *Railroad Co. v. Bohannon*, 6 Tex. Ct. R. 281, 71 S. W. Rep. 776.

Ejecting a passenger from a slowly moving train is not negligence *per se*. *Southern, etc., Ry. Co. v. Sanford*, 45 Kans. 372, 25 Pac. Rep. 891.

sort to unnecessary violence, it will be no defense that the passenger had offended against his rules, and had thereby subjected himself to the carrier's right to expel him; and not only the unnecessary force, but any circumstances of insult or indignity in the manner of his expulsion, may be shown in an action by the passenger.¹⁹

Sec. 1085. (§ 591a.) Effect of tender after refusal to pay or show ticket and ejection begun.—The question has frequently arisen whether, after a passenger has refused to pay the fare demanded or to produce his ticket, and the conductor has begun to eject him or has completely ejected him, the passenger may then tender the fare or ticket required and be entitled

19. *Knowles v. Railroad Co.*, 102 N. C. 59; *Steamboat Co. v. Brockett*, 121 U. S. 637; *Jardine v. Cornell*, 50 N. J. L. 485; *Brown v. Railroad Co.*, 66 Mo. 588; *Philadelphia, etc., R. Co. v. Larkin*, 47 Md. 155; *Mykleby v. Railway Co.*, 39 Minn. 54; *Coppin v. Braithwaite*, 8 Jurist, 875; *Moore v. The Railroad*, 4 Gray, 465; *Holmes v. Wakefield*, 12 Allen, 580; *Law v. The Railroad*, 32 Iowa, 534; *Bass v. The Railway*, 36 Wis. 450; *State v. Ross*, 2 Dutcher, 224; *Healy v. The Railroad*, 28 Ohio St. 23; *Hewett v. Swift*, 3 Allen, 420; *Penn. R. R. v. Vandiver*, 42 Penn. St. 365; *Seymour v. Greenwood*, 7 H. & N. 355; *Bayley v. The Railway*, L. R. 7 C. P. 415; *Kline v. The Railroad*, 37 Cal. 400; *Evansville, etc., R. Co. v. Gilmore*, 1 Ind. App. 468, 27 N. E. Rep. 992; *Alabama, etc., R. Co. v. Frazier*, 93 Ala. 45, 9 S. Rep. 303; *Gulf, etc., Ry. Co. v. Kuenhle* (Tex. Civ. App.), 16 S. W. Rep. 177; *Railroad Co. v. Holden*, 66 Ark. 602, 53 S. W. Rep. 45, citing *Hutch. on Carr.*; *Railroad Co. v. Brown*,

2 Kan. App. 604, 42 Pac. Rep. 588; *Randall v. Railway Co.*, 102 Mo. App. 342, 76 S. W. Rep. 493; *Railway Co. v. James*, 82 Tex. 306, 18 S. W. Rep. 589, 15 L. R. A. 347; *Wright v. Railroad Co.*, 21 R. I. 554, 45 Atl. Rep. 548; *Klenk v. Railroad Co.*, 27 Utah, 428, 76 Pac. Rep. 214.

If a white passenger is wrongfully ejected from a train, the fact that a colored train hand was called upon to assist in so doing will not make the company liable for greater damage than should be recovered if the train hand had been a white man. *Railroad Co. v. Strickland*, 90 Ga. 562, 16 S. E. Rep. 352.

If a passenger is unlawfully in a car reserved for whites and is ejected therefrom by another passenger, and excessive and unnecessary force is used and such passenger is aided and abetted in the use of such force by the conductor, the carrier will be liable for the injury inflicted. *Railway Co. v. Miller*, 9 Tex. Civ. App. 104, 28 S. W. Rep. 233.

to continue his journey upon that train. Upon this question the cases are not in harmony, but the prevailing rule, and the one supported by the better reasons, is that even though he may once have refused to pay his fare or show his ticket, he may, at any time before the process of ejection is begun, comply with the demand and continue his journey on that train;²⁰ but that where he so refuses and persists in his refusal, after being accorded reasonable time and opportunity to comply, until the conductor has the right and it is his duty to eject him, and the conductor has begun the process of ejection either by stopping the train or applying force to the passenger when necessary, the passenger thereupon forfeits his rights as a passenger, and his ejection may be completed even though he may thereafter tender the performance demanded.²¹ The reason

20. A mere willingness to pay, unaccompanied by a move or act calculated to suggest to the conductor his desire to do so, is not sufficient to place the conductor in the wrong in ejecting the passenger from the train. *Railway Co. v. James*, 82 Tex. 306, 18 S. W. Rep. 589, 15 L. R. A. 347.

The courts in Missouri make a distinction between cases in which there is a mere offer to pay fare after an ejection has begun, and cases in which there is an actual tender of the money. They incline to the rule that the conductor should receive the passenger's fare if the same is actually tendered during the process of ejection. *Holt v. Railway Co.*, 174 Mo. 524, 74 S. W. Rep. 631; s. c. 87 Mo. App. 203.

21. *Pease v. Railroad Co.*, 101 N. Y. 367; *O'Brien v. Railroad Co.*, 80 N. Y. 236; *Hibbard v. Railroad Co.*, 15 N. Y. 455; *Atchison, etc., R. Co. v. Dwelle*, 44 Kans. 394, 24 Pac. Rep. 500; *Pickens v. Railroad Co.*, 104 N. C. 312; *Clark v. Rail-*

road Co., 91 N. C. 506; *Hoffbauer v. Railroad Co.*, 52 Iowa, 344; *State v. Campbell*, 32 N. J. L. 309; *Cincinnati, etc., R. Co. v. Skillman*, 39 Ohio St. 444; *Louisville, etc., R. Co. v. Harris*, 9 Lea, 180; *Bland v. Railroad Co.*, 55 Cal. 570; *Railroad Co. v. Bauer*, 66 Ill. App. 124; *Behr v. Railroad Co.*, 74 N. Y. Supp. 1007, 69 App. Div. 416; *Garrison v. Electric Co.*, 97 Md. 347, 55 Atl. Rep. 371; *Railway Co. v. Turner* (Tex. Civ. App.), 23 S. W. Rep. 83.

Whenever a passenger refuses to accede to a just and lawful demand made upon him by the conductor for the payment of his fare, after being allowed a reasonable opportunity to comply, he thereby renounces his right to the position and privileges of a passenger, and subjects himself to expulsion from the train. If he changes his mind, and tenders the fare before anything is done towards bringing the train to a stop in order to eject him, his refusal will be retracted in time, and his right to remain

assigned in support of the rule is that if one passenger might, by his unjustifiable conduct, delay the train to put him off, another might do the same thing, thus producing the utmost irregularity in the running of the trains and jeopardizing the safety of the carrier's property and the lives of other passengers. As this reason would not exist when the train has stopped at a regular station, the rule has been held not to apply in that event.²²

When before refusal to perform, he has already been carried part way upon his journey, the passenger cannot escape ejection by tendering only the fare for the remainder of the journey,²³ nor can he continue his journey by buying a ticket for the remainder of the way.²⁴

But the rule justifying the refusal to accept a tender after and be carried will stand unaffected. If he higgles and hesitates until he becomes a proper subject for ejection, and until steps have been taken to that end, he is too late. Any rule which would allow any passenger to play fast and loose with the conductor would allow all the passengers to do so, and a train might thus be kept halting and alternating between running at ordinary speed and stopping throughout the whole of its journey. *Railroad Co. v. Asmore*, 88 Ga. 529, 15 S. E. Rep. 13, 16 L. R. A. 53. Overruling, insofar as it is contrary to the above rule, *Railroad Co. v. Mix*, 68 Ga. 572, where the court approve the rule that a tender must be accepted even after the passenger is fully ejected, if made before the train actually starts again, but not afterwards; but the conductor had been hasty in ejecting him in that case.

22. *Railroad Co. v. Hill*, 110 Tenn. 396, 75 S. W. Rep. 963; *Railroad Co. v. Wright*, 68 Ind. 586, 34

Am. Rep. 277; *O'Brien v. Railroad Co.*, 80 N. Y. 236.

See also, *Wardwell v. Railway Co.*, 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596, holding that this rule applies to cases where the carrier is not permitted by statute to eject persons from its passenger trains, except at a regular stopping place.

But see, *contra*, *Gulf, etc., Ry. Co. v. Riney*, — Tex. Civ. App. —, 92 S. W. Rep. 54, which holds that the ejection of the passenger at an intermediate station and his immediate re-entrance constitute but an interruption of the continuous passage undertaken in the first instance, and that the conductor is not obliged to accept him again until fare for the full journey is paid.

23. *Pennington v. Railroad Co.*, 62 Md. 95; *Gulf, etc., Ry. Co. v. Riney*, — Tex. Civ. App. —, 92 S. W. Rep. 54.

24. *Stone v. Railway Co.*, 47 Iowa, 82; *Swan v. Railroad Co.*, 132 Mass. 116; *Manning v. Rail-*

stopping must be confined to those cases in which the refusal was wilful,²⁵ and to justify the ejection in any case, a demand of performance must first have been made upon the passenger and a reasonable time allowed him within which to comply.²⁶

So a tender of fare by a third person for the passenger, made before the train has stopped, must, where the passenger quietly submits to the ejection, be accepted.²⁷ But where the passenger wilfully and violently refuses to pay his fare, and the process of ejection has begun, a subsequent tender of fare by such third person need not be accepted.²⁸

Sec. 1086. (§ 591b.) Duty of carrier to tender back fare received before ejection.—If a passenger is ejected from the

way Co. (Ala.), 11 So. Rep. 8, 36 Am. St. Rep. 225. The contrary was held, however, where a passenger who had paid his fare and procured his ticket rode part way upon it and then stopped over without a permit, and, on resuming his journey, being refused carriage, got off at the first station and bought a new ticket for the remainder of the journey. *Ward v. Railroad Co.*, 56 Hun, 268.

25. *Louisville, etc., R. Co. v. Harris*, 9 Lea, 180; *Texas, etc., Ry. Co. v. Bond*, 62 Tex. 442; *Harrison v. Fink*, 42 Fed. 787.

Where a passenger who was subject to chronic drowsiness fell asleep before his ticket had been called for, and the conductor ejected him from the train, the passenger not waking until he was partially out of the car, it was held that the conductor should have received his ticket when offered as soon as the passenger became sufficiently awake to understand what was wanted. *Ferguson v. Railroad Co.*, 98 Mich. 533, 57 N. W. Rep. 801.

26. *Southern Pac. Co. v. Patterson*, 7 Tex. Civ. App. 451, 27 S. W. Rep. 194, citing *Hutch. on Carr.*; *Texas, etc., Ry. Co. v. Bond*, 62 Tex. 442; *Curl v. Railway Co.*, 63 Iowa, 417. In this case the passenger lacked a dime, which another passenger was about to loan him, as the conductor knew, but it was not produced until just after the bell was rung, whereupon the passenger was ejected and the money refused.

27. *Missouri, etc., Ry. Co. v. Smith*, — Ind. Terr. —, 89 S. W. Rep. 668; *Ham v. Canal Co.*, 142 Pa. 617, 21 Atl. Rep. 1012; *Railroad Co. v. Garrett*, 8 Lea, 438, 41 Am. Rep. 640; *Railroad Co. v. Norris*, 17 Ind. App. 189, 46 N. E. Rep. 554, 60 Am. St. Rep. 166; *Randall v. Railway Co.*, 102 Mo. App. 342, 76 S. W. Rep. 493; *Clark v. Railway Co.*, 91 N. Car. 506, 49 Am. Rep. 647; *Hoffbauer v. Railway Co.*, 52 Iowa, 342, 3 N. W. Rep. 121, 35 Am. St. Rep. 278.

28. *Missouri, etc., Ry. Co. v. Smith*, — Ind. Terr. —, 89 S. W. Rep. 668.

train, it is the duty of the conductor to return the unearned portion of his fare, or its equivalent, before he leaves the train. That duty is a condition precedent to the right of ejection, and, for a failure in that regard, the carrier will be liable in damages notwithstanding the passenger makes no demand for its return before leaving the train.²⁹ Thus a passenger bought a ticket in good faith, relying upon the ticket agent's assurance that he might stop over upon it, which he did, although, in fact, the ticket gave no such right, a custom to that effect having been recently terminated. Upon attempting to continue his journey upon it, the conductor refused to accept the ticket and expelled the passenger from the train for refusing to pay a second fare, no allowance or rebate being offered for the amount already paid for the ticket. Said the court, in Maine:³⁰ "The conductor had proof from the ticket that the fare had been paid for the whole distance, and from the statements of the plaintiff, which he had no reason to doubt, and which were confirmed by the custom so lately abrogated, that he had paid it upon the representations of the agent that the ticket would carry him through. If, under these circumstances, the company, through the conductor, would repudiate or deny the contract, the least they could do would be to pay back the surplus money that they had received or deduct it from the fare claimed, neither of which was done or offered to be done, and this they were legally bound to do before refusing to execute the contract made by their agent even if they were not bound by it."³¹

So a passenger went on board the train without a ticket and paid the ticket fare, but refused to pay the extra rate required when paid on the train. He was thereupon put off and

29. *Wardwell v. Railway Co.*, 46 Minn. 514, 49 N. W. Rep. 206, 24 Am. St. Rep. 246, 13 L. R. A. 596; *Braun v. Railway Co.*, 79 Minn. 404, 82 N. W. Rep. 675, 984, 79 Am. St. Rep. 497, 49 L. R. A. 319; *Bland v. Southern Pacific Co.*, 55 Cal. 573, 36 Am. Rep. 50.

The court refused to pass upon this question in *Railroad Co. v. Mayo*, 4 Ind. App. 413, 30 N. E. Rep. 1106.

30. *Burnham v. Railroad Co.*, 63 Me. 298.

31. Citing *Cheney v. Railroad Co.*, 11 Metc. 121.

then the money he had already paid was tendered back to him. The court held, however, that it should have been returned to him before he was ejected.³² But where the amount paid did not exceed the rate which the company was entitled to receive when paid upon the train for carriage to the point of ejection, the failure to tender back any part of it was excused.³³

Sec. 1087. Duty of carrier to tender back fare received when parent is ejected for non-payment of child's fare.—We have already seen that, when a person, having in charge a child of sufficient age to require payment of fare, takes passage on a train, such person becomes liable for the payment of the child's fare, and upon refusal to pay, both may be ejected from the train at the next station. When such person has paid fare, or purchased a ticket which is taken up by the conductor, the latter must, before ejecting such person and child, return or offer to return to such person the unused value of such ticket over and above the fares of both for the distance already traveled. If the ticket is such that a stop-over may be had thereon, the conductor may tender a stop-over check instead of money, but to retain the ticket and expel the parties from the train will render the company liable in damages.³⁴

Sec. 1088. Duty of carrier to return ticket claimed to be void or worthless before ejecting passenger.—A like question arises when the carrier takes up and refuses to return a passenger's ticket, but ejects him from the train on the ground that the ticket is void or worthless. It has been held that the refusal of the carrier under such circumstances to return the ticket to the passenger will not entitle him to be carried without payment of fare.³⁵ In view of the fact, however, that the

³² *Bland v. Railroad Co.*, 55 Cal. 570.

³³ *Hoffbauer v. Railroad Co.*, 52 Iowa, 342.

³⁴ *Railroad Co. v. Orndorff*, 55 Ohio St. 589, 45 N. E. Rep. 447, 60 Am. St. Rep. 716, 38 L. R. A. 140.

³⁵ *Elliott v. Southern Pacific Co.*, 145 Cal. 441, 79 Pac. Rep. 420, 68 L. R. A. 393. (There is a dissenting opinion in this case on the ground that the ticket was the property of the plaintiff and had a legal value as evidence of a broken contract.)

ticket may be a valuable piece of evidence to the passenger if the conductor was in fact mistaken concerning its validity, it would seem that the ticket should be returned to the passenger before ejection or requiring payment of another fare. The courts and not the carrier should be the final arbiter as to the validity of a ticket, and the latter should not be permitted to withhold from the passenger a ticket in which he has the property right and which might be the only evidence he has of the wrongful nature of his ejection.³⁶ A different question with the opposite result would, of course, be presented if the original purchaser had agreed to a stipulation on the ticket that it might be forfeited if presented after a designated period, or by a person in whose hands it was worthless, and such stipulation was not complied with.

Sec. 1089. (§ 592.) The right to resist ejection—May resist ejection from train in rapid motion.—The carrier having thus, as has been seen in the preceding sections, the right to eject the passenger for the non-payment of fare, for the failure to produce the proper ticket, for misconduct and for a refusal to observe the carrier's reasonable regulations, it becomes an important question to determine when and to what extent the passenger may resist ejection.

In the first place it may be noticed that if the conductor, or any servant of a railway company, undertake to eject a passenger while the train is moving so rapidly that the latter's life would be endangered by being forced from it, he may resist the attempt, as he would have the right to resist an attempt to take his life. "A person," said Comstock, J., "cannot be thrown from a railroad train in rapid motion, without the most imminent danger to life; and, although he may be justly liable to expulsion, he may lawfully resist an attempt to expel him in such a case. As the refusal of a passenger to pay

36. *Vankirk v. Pennsylvania R. Co.*, 76 Pa. St. 66, 18 Am. Rep. 404. (The court, in *Elliott v. Southern Pacific Co.*, *supra*, attempted to distinguish this case, but in the opinion of the editors of this edition it is squarely *contra*.)

fare will not justify a homicide, so it fails to justify any act which in itself puts human life in peril; and the passenger has the same right to repel an attempt to eject him, when such an attempt will thus endanger him, that he has to resist a direct attempt to take his life. The great law of self-preservation so plainly establishes this conclusion that no further argument can be necessary.’¹

Sec. 1090. (§ 593.) Same subject—Resistance when rightfully on train—Resistance not necessary to preserve passenger’s rights—Damages for injuries received while resisting.—

And not only may the passenger resist being put off under circumstances or in a manner which may endanger his safety, even when he has forfeited his right to be carried further, but when he is lawfully upon the train, and has the right to be carried on, if the conductor wrongfully attempts to eject him under a mistake as to his right to do so, the passenger may, it has been held, resist to the utmost extent necessary to prevent it.² “When a conductor is in the wrong,” say the court in *English v. The Canal Company*,³ “the passenger has a right to protect himself against any attempt to remove him, and resistance can lawfully be made to such an extent as may be essential to maintain such a right. Cases occur where circumstances may imperatively require that the passenger should remain on the train on account of others who may be there in his charge, or where it is indispensable that he should hasten on his journey without delay; and if, by reason of the mistaken

1. *Sandford v. Railroad Co.*, 23 N. Y. 343.

2. *Railroad Co. v. Winter’s Adm’r*, 143 U. S. 60, 73, 12 Sup. Ct. R. 356; *Railway Co. v. Russ*, 67 Fed. 662, 14 C. C. A. 612, 34 U. S. App. 14; *s. c.* 57 Fed. 822, 6 C. C. A. 597, 18 U. S. App. 279; *Louisville, etc., Ry. Co. v. Wolfe*, 128 Ind. 347, 27 N. E. Rep. 606; *Ellsworth v. Railway Co.*, 95 Iowa, 98, 63 N. W. Rep. 584, 29 L. R. A. 173.

The passenger may make reasonable effort to exercise his right to resist a wrongful ejection. *McDonald v. Railroad Co.*, — N. J. Law —, 62 Atl. Rep. 405. Nor is he required to purchase, even for a trifle, the right which he already has under his ticket. *Cherry v. Railroad Co.*, — Mo. —, 90 S. W. Rep. 381.

3. 66 N. Y. 454.

judgment or wilfulness of the conductor, he could be expelled when lawfully there, serious injury might follow. The law does not, under such circumstances, place the passenger within the power of the conductor; and when lawfully in the cars, he is authorized to vindicate such right to the full extent which might be required for his protection.”

But while a passenger lawfully upon the train may have the legal right to resist a wrong attempt to eject him, even if undertaken at a proper place and under otherwise proper circumstances, it is certainly not a prudent remedy,⁴ for it is clearly settled that the rights of the passenger are as fully protected when he pays an unlawful demand under protest, or, in like manner, leaves the car at the conductor's demand, as when he resists and is forcibly ejected.⁵

4. In *Hufford v. Railway Co.*, 53 Mich. 118, where the question arose upon the ejection of a passenger who had been furnished with what was claimed to be a ticket, good upon its face at least, Cooley, C. J., said: “The plaintiff, therefore, in this case, if it was found that the ticket he held was not good by reason of former use and cancelment, should have paid his fare when it was demanded, and looked afterwards to the railroad company for the refunding of the money and for compensation for any trouble he might be put to in obtaining it. And it would have been very prudent and proper for him to adopt this course, even though there was nothing on the face of the ticket to apprise him of the invalidity. If the conductor, who was manager of the train, informed him that for any reason the ticket was one he could not receive, a contest with him over it must generally be very profitless and there-

fore inadvisable. But we are all of opinion that if the plaintiff's ticket was apparently good he had a right to refuse to leave the car.”

5. In *Southern, etc., Ry. Co. v. Rice*, 38 Kan. 398, Rice had a good ticket for that trip and train, but the conductor mistakenly determined it to have expired and ejected him. Said Horton, C. J.: “We fully concede that no one has a right to resort to force to compel the performance of a contract made with him by another; and a passenger about to be wrongfully expelled from a railroad train need not require force to be exerted to secure his rights or increase his damages. For any breach of contract or gross negligence on the part of the conductor or other employees of a railroad company, redress must be sought in the courts, rather than by the strong arm of the person who thinks himself about to be deprived of his rights. A passenger should not be per-

Some courts have departed entirely from the rule first mentioned and hold that, though unlawfully ejected, the passenger is not entitled to recover damages for injuries received which were caused by his resistance, and which would not have happened had he not resisted. Injuries from undue and unnecessary force may be compensated, but the passenger has no right, even when not in fault, to invite the application of force, and then recover damages for injuries thereby sustained.⁶

A fortiori, where the passenger is in the wrong, and the conductor has the right to eject him, and is proceeding to do so in a lawful manner, the passenger has no right to resist,

mitted to invite a wrong and then complain of it. *Hall v. H. & C. R. Co.*, 15 Fed. Rep. 57; *Townsend v. N. Y. C. R. Co.*, 56 N. Y. 301; *Bradshaw v. S. B. R. Co.*, 135 Mass. 409; *Railroad Co. v. Connell*, 112 Ill. 296; *Palace Car Co. v. Reed*, 75 *id.* 125; 3 Wood's Ry. Law, § 364. Of course, a party upon a train may resist when, under the circumstances, resistance is necessary for the protection of his life or to prevent probable serious injury; nor can a party be lawfully ejected from a train while in motion so that his being put off would subject him to great peril. In this case Rice made no unreasonable resistance. He did not resort to force or violence; having a good ticket and being entitled to ride, he refused to pay fare or get off the train. The conductor had no difficulty in leading him off, and about all that Rice did was merely to assert his lawful right to ride upon the train. Where a passenger with a clear right and a clean ticket is entitled to ride on that trip and train, and is wrongfully ejected without forcible resistance upon his part, the

jury are and ought to be allowed great latitude in assessing damages. They should award liberal damages in full compensation for the injuries received. The quiet and peaceable behavior of a passenger is to his advantage rather than to his detriment."

6. *Pennsylvania Co. v. Connell*, 112 Ill. 295; *Railroad Co. v. Casazza*, 83 Ill. App. 421; *Railroad Co. v. Louthan*, 80 Ill. App. 579; *Pullman Palace Car Co. v. Lee*, 49 Ill. App. 75; *Randall v. Railway Co.*, 102 Mo. App. 342, 76 S. W. Rep. 493, citing *Hutch. on Carr.*; *Monnier v. Railroad Co.*, 175 N. Y. 281, 67 N. E. Rep. 569, 96 Am. St. Rep. 619, 62 L. R. A. 357, *reversing*, by divided court, 75 N. Y. Supp. 521, 70 App. Div. 405; *Hall v. Memphis R. Co.*, 15 Fed. Rep. 57; *Brown v. Memphis & C. R. Co.*, 7 Fed. Rep. 51; *Railway Co. v. Hoerr*, 120 Ill. App. 65.

In *Pennsylvania R. Co. v. Connell*, *supra*, the court said: "A train crowded with passengers—often women and children—is no place for a quarrel or a fight between a conductor and a passenger, and it would be unwise and

and if in doing so he receive injury, he will have no one to blame but himself.⁷

Sec. 1091. (§ 594.) Whether due care has been used, a question of fact.—But it does not necessarily follow, as a conclusion of law, that the railway carrier will be liable for the injury which may be sustained by the passenger in being put off while the car is in motion. This, it has been held, is a question for the jury, and not for the court, the inquiry in every such case being whether due and proper care was used in the removal.⁸ But it is most unquestionably the duty of such car-

dangerous to the traveling public to adopt any rule which might encourage a resort to violence on a train of cars. The conductor must have the supervision and control of his train, and a demand on his part for fare should be obeyed, or the passenger should in a peaceable manner leave the train, and seek redress in the courts, where he will find a complete remedy for every indignity offered, and for all damages sustained."

7. *Townsend v. The Railroad*, 56 N. Y. 295; *Murphy v. The Railway*, 118 Mass. 228; *Railway Co. v. Daniels*, 90 Ill. App. 154; *McCullen v. Railway Co.*, 74 N. Y. Supp. 209, 68 App. Div. 269.

In the *Townsend* case, *supra*, the court, per Grover, J., say that when the conductor of the train tells the passenger in explicit terms that he cannot retain his seat upon that ticket, but must pay fare or leave the car, this amounts to ejection. "He then knows that he cannot proceed upon the ticket taken, but must resort to his remedy the same as though he had been ejected. If, after this notice, he waits for the application of

force to remove him, he does so in his own wrong; he invites the use of the force necessary to remove him; and if no more is applied than is necessary to effect the object, he can neither recover against the conductor or company therefor. This is the rule deducible from the analogies of the law. No one has a right to resort to force to compel the performance of a contract made with him by another. He must avail himself of the remedies the law provides in such case. This rule will prevent breaches of the peace instead of producing them; it will leave the company responsible for the wrong done by its servant without aggravating it by a liability to pay thousands of dollars for injuries received by an assault and battery caused by the faithful efforts of its servants to enforce its lawful regulations."

8. *Healey v. The Railroad*, 28 Ohio St. 23; *Murphy v. The Railway*, *supra*.

In an action for forcible ejection from a car, it is not competent for a conductor to testify that he did not use more force than was necessary, as that is a ques-

riers, if their cars be moving at a rate which would make the removal unsafe, either to stop them or slacken their speed to such a degree as that the passenger, even when he had forfeited his right to be carried further, might leave or be put off safely; and any failure to observe such care would evince reckless conduct which would merit the severest animadversion.⁹

Sec. 1092. Relation of carrier and passenger does not cease on wrongful ejection.—If the conductor wrongfully ejects a passenger at a point on the carrier's road, the passenger does not lose his rights as such by being forced from the car; nor does the ejection, after it is accomplished, authorize the conductor to disregard any duty he would have owed the passenger but for the ejection.¹⁰ But if, after ejection, the person ejected re-enters the train and is carried to his destination, he receives the full benefit of his contract of carriage, and cannot recover on the contract. Whether he would be entitled to at least nominal damages in an action of tort, if his ejection was in fact wrongful, is another question which would probably be answered in the affirmative.¹¹

17. *The treatment of the passenger.*

Sec. 1093. (§ 595.) The treatment due the passenger.—The passenger is entitled not only to every precaution which can be used by the carrier for his personal safety, but also to respectful treatment from him and his servants. From the moment the relation commences, as has been seen, the passenger is, in

tion for the jury. *Regner v. Railroad Co.*, 26 N. Y. Supp. 625, 74 Hun, 202.

9. *Lovett v. The Railroad*, 9 Allen, 557; *Hestonville, etc., R. Co. v. Biddle* (Pa. St.), 16 Atl. Rep. 488.

In *Railroad Co. v. Kid*, 29 Ill. App. 353, the conductor's conduct was denominated "not only illegal

but reckless" where he forced a passenger off a train moving at the rate of five or six miles an hour at a point one-fourth of a mile from a station.

10. *McGhee v. Cashin*, 130 Ala. 561, 30 So. Rep. 367.

11. *Railroad Co. v. Olsen*, 7 Ind. App. 698, 34 N. E. Rep. 531.

a great measure, under the protection of the carrier, even from the violent conduct of other passengers, or of strangers who may be temporarily upon his conveyance. But as against the assaults and violence of his servants, the passenger has the right to claim an absolute protection, and the carrier will undoubtedly be held responsible for any unnecessary personal abuse or violence of which they may be guilty in their treatment of the passenger whilst engaged in the discharge of their assigned and appropriate duties, although such abuse may consist in an assault or battery upon the person of the passenger, and may be wholly unauthorized by the carrier and prompted by the vindictive feelings of the servant towards the passenger. And it is undoubtedly well settled law that, when an assault or battery by the carrier's servant occurs upon the carrier's vehicle, the carrier may be held responsible even when the servant has seemingly departed from the line of his duty, and has committed the assault or the personal violence upon the passenger aside from and under circumstances wholly unconnected with the discharge of such duty; and that the fact of his being in the employment of the carrier, and engaged in the prosecution of his business upon his vessel or vehicle, will make the malicious and unauthorized attack of the servant upon the passenger a breach of duty for which the carrier himself may be held liable.¹² This rule is as true in respect of carriers by water as in respect of carriers by land.¹³

12 *Railway Co. v. Divinney*, 66 Kan. 776, 71 Pac. Rep. 855; *Johnson v. Railway Co.*, 130 Mich. 453, 90 N. W. Rep. 274; *Haver v. Railroad Co.*, 62 N. J. Law 282, 41 Atl. Rep. 916, 72 Am. St. Rep. 647, 43 L. R. A. 84; *White v. Railroad Co.*, 115 N. Car. 631, 20 S. E. Rep. 191, 44 Am. St. Rep. 489; *Railroad Co. v. Ray*, 101 Tenn. 1, 46 S. W. Rep. 554; *Railway Co. v. Johnson*, 29 Tex. Civ. App. 184, 68 S. W. Rep. 58; *Gillingham v. Railroad Co.*, 35 W. Va. 588, 14 S. E. Rep. 243, 29

Am. St. Rep. 827, 14 L. R. A. 798.

Where a female passenger, while awaiting at the carrier's depot, is assaulted by a negress employed by the carrier in such depot, the carrier will be liable although the conduct of the negress was wilful and malicious. *Gulf, etc., Ry. Co. v. Luther*, — Tex. Civ. App. —. 90 S. W. Rep. 44, citing *Hutch. on Carr.*

13. Thus a steamboat company is liable in damages to a passenger whom the captain handcuffs

Sec. 1094. (§ 596.) Liability of carrier for ill-treatment of passenger—Liable for assaults by brakemen and conductors.

Passengers on railroad trains are peculiarly under the control of the carrier's agents, and are practically helpless when compelled to defend themselves against their abuse or assaults. It is consequently necessary to hold a railroad company to a strict accountability for any acts of its servants on a train which tend to injure or humiliate the passenger, even though such acts may be malicious and unauthorized.¹⁴ This has been held to be true not only as to conductors¹⁵ who are in

for alleged failure to pay his fare and who is wrongfully ejected from the boat. *Trabing v. Nav. & Imp. Co.*, 121 Cal. 137, 53 Pac. Rep. 644.

So if a steamboat company negligently employs a quarrelsome, violent and fighting crew, and a passenger is injured on that account, without fault on his part, it is no defense that the class of men usually employed on steamboats are of that kind. *Memphis & C. Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. Rep. 527.

14. Railroad companies have been held liable in a number of cases where a servant of the company has pushed or thrown a passenger from the train. *Railroad Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. Rep. 971; *Railroad Co. v. Bostwick*, 100 Ga. 96, 27 S. E. Rep. 725; *Savannah, etc., R. Co. v. Bryan*, 86 Ga. 312, 12 S. E. Rep. 307; *Railway Co. v. Gastka*, 128 Ill. 613; *Dennis v. Railroad Co.*, 165 Pa. St. 624, 31 Atl. Rep. 52; *Sharer v. Paxon*, 171 Pa. St. 26, 33 Atl. Rep. 120.

But the company is said not to be liable for the malicious and criminal act of an employe, as if he should set in motion uncon-

trolled an engine upon the track (*Mars v. Canal Co.*, 54 Hun, 625); nor for wanton acts, in West Virginia (*Ricketts v. Railway Co.*, 33 W. Va. 433).

15. *Railway Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. Rep. 778; *Cole v. Railroad Co.*, 102 Ga. 474, 31 S. E. Rep. 107; *Railroad Co. v. Moore*, 101 Ga. 684, 28 S. E. Rep. 1000; *Savannah, etc., R. Co. v. Bryan*, 86 Ga. 312, 12 S. E. Rep. 307; *Railway Co. v. Gastka*, 128 Ill. 613; *Railroad Co. v. Barger*, 80 Md. 23, 30 Atl. Rep. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220; *Ramsden v. Railroad Co.*, 104 Mass. 117; *Shaefer v. Railway Co.*, 98 Mo. App. 445, 72 S. W. Rep. 154; *Railway Co. v. Tarkington*, 27 Tex. Civ. App. 353, 66 S. W. Rep. 137; *Railway Co. v. Gaines* (Tex. Civ. App.), 79 S. W. Rep. 1104; *Smith v. Railway Co.*, 48 W. Va. 69, 35 S. E. Rep. 834; *Western, etc., R. Co. v. Turner*, 72 Ga. 292; *Gasway v. Railroad Co.*, 58 Ga. 216; *Illinois Cent. R. Co. v. Sheehan*, 29 Ill. App. 90; *Railway Co. v. Wood*, 113 Ind. 544.

In *Railway Co. v. Fleetwood*, *supra*, the conductor rudely pulled a passenger to the end of the car and spit in his face.

In *Cole v. Railroad Co.*, *supra*,

charge of a train, but also as to brakemen.¹⁶ In a leading case upon this subject¹⁷ the evidence was that the plaintiff was a passenger in the defendant's railway-car, and in the absence of the conductor surrendered his ticket to a brakeman. The brakeman afterwards approached him, and in language coarse, profane and grossly insulting, denied that he had given him the ticket, calling him a liar, a cheat, shaking his fist in the plaintiff's face, and threatening, if he opened his mouth, to kill him. This abusive language was continued for some minutes in view of many passengers, and was promptly reported to the company's agent, but the brakeman was nevertheless retained in the company's employment. A verdict for a large amount was found against the company. This was approved by the appellate court. "It may be true," it was said, "that, if the carrier's servant wilfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever

the conductor used opprobrious and abusive language tending to humiliate the passenger.

In *Railroad Co. v. Moore*, *supra*, a boy was shot in the leg, after leaving the train, by the conductor as the train was moving off.

In *Railway Co. v. Tarkington*, *supra*, the conductor used harsh and insulting words to a female passenger.

16. *Lampkin v. Railroad Co.*, 106 Ala. 287, 17 So. Rep. 448; *McKinley v. Railway Co.*, 44 Iowa, 314; *Railroad Co. v. Henry*, 55 Kan. 715, 41 Pac. Rep. 952, 29 L. R. A.

465; *Railroad v. Winslow*, 27 Ky. L. Rep. 329, 84 S. W. Rep. 1175; *Williams v. Gill*, 122 N. Car. 967, 29 S. E. Rep. 879; *Railroad Co. v. Washington* (Tex. Civ. App.), 30 S. W. Rep. 719.

So the carrier has been held liable where a brakeman struck a passenger in the face with a lantern because the passenger, who had lost his watch, said he thought the brakeman had it. *Chicago, etc., R. Co. v. Flexman*, 103 Ill. 546.

17. *Goddard v. The Railway*, 57 Me. 202.

source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished; but, on the contrary, the passenger is assaulted and insulted through the negligence or wilful misconduct of the carrier's servant, the carrier is necessarily responsible. And it seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants, and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust.''¹⁸

Sec. 1095. (§ 597.) Same subject—Liable for assaults by porters or omnibus guards.—So it has been held that a railroad company is liable for the wrongful assaults upon a passenger by the porter of a sleeping-car,¹⁹ or drawing-room car²⁰ attached to its train, the servants in charge of these cars being considered, for the purposes of the contract between the railroad company and the passenger, as the servants of the railroad company.²¹ And the owner of an omnibus has been made to respond in damages where the omnibus guard threw a passenger, whom he deemed to be drunk, to the ground.²²

18. The same principle was applied in the same court in the case of *Hanson v. The Railway*, 62 Me. 84, in which the proof was of an assault and battery upon a passenger by a brakeman, equally unprovoked and aggravated, and as little pertinent to his duty, and a verdict for \$10,000 was not regarded as excessive under the circumstances.

19. *Dwinelle v. Railroad Co.*, 120 N. Y. 117.

See also, *Bayley v. The Railway Co.*, L. R. 7 C. P. 415.

20. *Williams v. Railway Co.*, 40 La. Ann. 417.

21. *Pennsylvania Co. v. Roy*, 102 U. S. 457.

22. *Seymour v. Greenwood*, 7 H. & N. 355.

Sec. 1096. Same subject—Like rule governs as to liability of carrier by water for assault by servants.—As we have already seen, carriers by water owe the same duty, in respect of the treatment of passengers, as carriers by land and are held to the same liability.²³ Thus, where a deck passenger upon a steamboat, after having paid the price of his passage, was assaulted and severely beaten by the clerk to whom he had immediately before paid it, for the alleged reason that he had been secreting himself under the boilers of the boat, the owners of the steamboat were held liable as the carriers of the passenger for the act of their clerk, and were made to pay damages for the injuries inflicted, including the loss of an eye by the passenger.²⁴ And in another case, the owners of a steamboat were made liable for the battery of a passenger by the steward of the boat and his assistants, growing out of a dispute as to whether another passenger, whose cause the plaintiff espoused, had paid for his supper.²⁵ So a carrier by water is liable for a wrongful assault by the mate of a ship upon a passenger.²⁶

Sec. 1097. (§ 598.) Same subject—Exemplary damages allowed.—In these cases it was not only held that the carrier was liable for the injury which had been sustained by the passenger from the ill-treatment of the servant, but that they were proper cases for exemplary damages, and verdicts against the defendants for amounts greatly in excess of the actual damage from the injuries inflicted were considered proper. But, though there can be no doubt that they carry the doctrine of *respondeat superior* to a great length, and beyond the limit which has been thought justifiable in other classes of cases, they are sustained by the weight of authority elsewhere as to the liability of the carrier under similar circumstances.²⁷

23. *Trabing v. Nav. & Imp. Co.*, 121 Cal. 137, 53 Pac. Rep. 644; 180.

Memphis & C. Packet Co. v. Pikey, 142 Ind. 304, 40 N. E. Rep. 527. 26. *Springer Transp. Co. v. Smith*, 16 Lea, 498.

24. *Sherly v. Billings*, 8 Bush, 147; and see *Pendleton v. Kinsley*, 3 Cliff. 416. 27. See *post*, § 1442.

Sec. 1098. (§ 599.) Same subject—Early overruled cases in New York hold carrier not liable for assault by servant not acting in line of his duty.—A different view of the law was formerly taken by the courts of New York in subsequently overruled cases. In *Isaacs v. The Railroad*,²⁸ a female passenger upon a street car rang the bell to stop the car, in order that she might alight, and while she stood upon the platform of the car, which was yet in motion, insisting upon its being stopped, the conductor, with a rough remark, seized her by the shoulder and violently threw her to the ground, and her leg was broken by the fall. The liability of the company for the act of the conductor was denied, upon the ground that the act was wanton and reckless, and not in the performance of the conductor's duty or of any act authorized by the company. "Whenever an injury," it was said, "has been caused by the conduct of a servant in the business of his master, and within the scope of his employment, the master has been held liable, although such conduct may have been tortious. The question of liability does not depend entirely on the quality of the act, but rather upon the other question, whether it has been performed in the line of duty and within the scope of the authority conferred by the master. When the act of a servant, whether a trespass or otherwise, is without the authority, either expressly conferred upon the servant, or implied from the nature of the employment and character of the duties, and causes injury to others, the master is not answerable. It is said that the implied authority in the servant is limited to those acts which the master could himself do if personally present, and if in the performance of such acts the servant misconducts himself, the master will be liable for his acts." But this case, though the principle has been followed in some others,²⁹ was afterwards shown to have been incorrectly decided

28. 47 N. Y. 122.

29. *Parker v. The Railway*, 5 Hun, 57; *Whitaker v. The Railroad*, 51 N. Y. 295; *Hibbard v. The Railroad*, 15 *id.* 455; *Higgins*

v. The Turn. & R. R. Co., 46 *id.* 23; *Weed v. Railroad*, 17 *id.* 362; *Drew v. The Railroad Co.*, 26 *id.* 49.

because it ignored the distinction between the duty owed by the carrier to a passenger and that owing to a mere stranger.³⁰ Thus it has been held by the same court that a railway company may be liable to an action for assault and battery for blows upon the face of the passenger, struck by the conductor of the car in attempting to eject the passenger who resisted; for, it was said, such an act may be done without malice or ill feeling, and may be deemed necessary by the conductor to effect the purpose with which he is charged in the proper performance of his duty.³¹

Sec. 1099. (§ 600.) Liability of carrier for assault by servants in station or before or after the existence of the relation of carrier and passenger.—But the elementary rule that the master can be held liable for the tortious acts of the servant only when they are done by the servant in the course of the servant's duty, and in his undertaking to perform it, but not when they are acts of wilful misconduct, has been made the test of the carrier's liability to the passenger when the tortious acts complained of have been committed by the carrier's servant before the relation of carrier and passenger has commenced,³² or after it has ceased,³³ or while the passenger re-

30. *Stewart v. Railroad Co.*, 90 N. Y. 588.

31. *Jackson v. The R. R.*, 47 N. Y. 274.

32. One who goes to a railway station, even though intending to take passage some hours in the future, and engages in other business (such as writing up his insurance reports), cannot be said to have put himself directly under the carrier's control and care with the *bona fide* intention of becoming a passenger, so as to make the company liable to him for an assault by the station agent. *Andrews v. Railroad Co.*, 86 Miss., 129, 38 So. Rep. 773.

See also, *Railroad Co. v. Richmond*, 98 Ga. 495, 25 S. E. Rep. 565.

But the railway company is liable where the ticket agent on an elevated road violently and wilfully pushed down stairs a man to whom he had refused to sell a ticket under the erroneous impression that he was drunk (*McKernan v. Railway Co.*, 54 N. Y. Super. 354).

33. The plaintiff was rightfully ejected from a station room by a station agent who used no more force than was necessary for that purpose. Thereafter an altercation occurred between the plain-

mains as such upon the station grounds.³⁴ Where the relation of carrier and passenger has not commenced, or where it

tiff and the station agent, and, in the scuffle that ensued, plaintiff was shot in the thigh. The fight occurred on the platform after the plaintiff had applied some opprobrious epithets to the station agent. The appellate court found as a matter of fact that the station agent in the fight on the platform was not acting in the line of his duty and held the railroad company not liable in damages for plaintiff's injuries. *Railroad Co. v. Randolph*, 65 Ill. App. 208.

So in *Central Railway Co. v. Peacock*, 69 Md. 257, the driver on a street car used insulting language to a passenger, who replied that when they got to the office of the company (which they were soon to pass) he would report him. When the car got within a block of the office, the passenger left the car and started toward the office, intending to report the conduct of the driver and then return to the car to continue his journey. He did not inform the driver of his intention to return to the car. The driver, on seeing the passenger going toward the office, got off the car, intercepted the passenger and beat him severely with the iron car-brake. The court held that the plaintiff had ceased to be a passenger, that the driver was not acting in the line of his duty, and that the car company was not liable for the assault.

But in a very similar case, where the conductor first assaulted a passenger upon the car

and then followed him to the office, where he had gone to make complaint, and again assaulted him there, the company was held liable for both assaults, the conductor being deemed to be acting on both occasions as an employee and violating the duty which the company owed to the plaintiff as a passenger. *Savannah, etc., R. Co., v. Bryan*, 86 Ga. 312, 12 S. E. Rep. 307.

See, also, *Daniel v. Railroad Co.*, 117 N. Car. 592, 23 S. E. Rep. 327, where a person was shot by the baggage master during an angry altercation after the relation of carrier and passenger had ceased, and a finding of the jury that the baggage master was acting within the scope of his authority was not disturbed.

In *The Little Miami Railroad Co. v. Wetmore*, 19 Ohio St. 110, an altercation occurred between the passenger and the baggage-master of the railroad, which resulted in an attack by the latter upon the passenger with a hatchet, from which he received serious injury; but it was held that the assault was not in the course of the business of the servant of the defendant, and that it could not therefore be held liable.

In *Crocker v. The Railroad*, 24 Conn. 249, a person was kicked while attempting to re-enter the car after ejection, and the rule in the text was applied.

34. In *Railway Co. v. Bowlin*, (Tex. Civ. App.) 32 S. W. Rep. 918, the railroad company was held liable for the act of one who

has ceased, there can, of course, be no question but that the ordinary application of the rule of *respondeat superior* should

was clothed with the authority of a peace officer in the station in striking a passenger with his billy.

A railroad company operating a union depot will be liable in damages for an assault by a gatekeeper on a passenger who has purchased a ticket, and the exact spot where the attack took place, whether before or after passing the gate, is immaterial, since the gist of the action is the unlawful attack on the passenger within defendant's depot and by defendant's servant. *Railway Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. Rep. 219.

In *Palmeri v. Railway Co.*, 133 N. Y. 261, 30 N. E. Rep. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632, the plaintiff purchased a ticket of the agent at the elevated railroad station and passed through to take the cars, after some altercation about the amount of change. The ticket agent immediately afterwards came out upon the platform of the station, charged her with having given him a counterfeit piece of money and demanded another quarter in the place of the one given him. She insisted on her money being genuine and refused to give another quarter, or to hand back the change. He became angry and called her a counterfeiter and a common prostitute. He placed his hand upon her and told her not to stir until he had procured a policeman to arrest and search her. He detained her in the station for a while, but let her go

when he failed to get an officer. An action was brought against the company for the unlawful imprisonment, accompanied by the slanderous words. The court distinguished the case from that of *Mulligan v. The Railway Co.*, 129 N. Y. 506, and said that the agent was acting for his employers and with no other conceivable motive, losing his temper and injuring and insulting the plaintiff. What he did was in the endeavor to protect and recover his employer's property, and if, in his conduct, he committed an error which was accompanied by insulting language and detention of the person, the defendant, as his employer, was legally responsible in an action for damages for the injury.

Contrast *Gray v. Railroad Co.*, 168 Mass. 20, 46 N. E. Rep. 397, where the carrier was held liable for injuries caused by the plaintiff being knocked down by its servant and a drunken man, while the former was ejecting the latter from the station, with *Goodloe v. Railroad Co.*, 107 Ala. 233, 18 So. Rep. 166, 29 L. R. A. 729, where the carrier was held not liable for injuries caused by plaintiff being accidentally pushed from the station platform during a friendly scuffle of the carrier's servants on the platform.

Where a passenger contracts smallpox from the carrier's ticket agent, the carrier is not liable in damages to such passenger unless it is shown that it knew or had reason to know the ticket agent was so afflicted. *Long v. Railroad*

apply. And the same result has also been reached by the majority of the courts in those cases where the relation of carrier and passenger exists, but the passenger is either waiting for or has just left his train and is still upon the station premises. The reason for this latter view is that, while on the station premises, the passenger is supposed to be able to care for himself in some degree, and the carrier is not obliged to exercise that extraordinary degree of care for his safety that is required while on the train. It is but just, therefore, that the carrier should be held liable for the tortious acts of its servants done in the course of their employment about the station grounds, but not for their malicious and unauthorized acts outside the scope of their employment. Illustrations of cases where the carrier has been held liable or not liable are found in the notes.

Sec. 1100. (§ 601.) Liability of carrier for wrongful arrest of passenger by carrier's servants.—As cases of wrongful arrest of a passenger by the carrier's servants usually arise before the actual carriage has commenced, or after it has ceased, the usual rule of *respondeat superior* is applied in that class of cases. In the application of that rule, however, the earlier cases,¹ and especially the English cases, show a much more

Co., 48 Kan. 28, 28 Pac. Rep. 977, 15 L. R. A. 319.

See also, *Railroad Co. v. Batchler*, 32 Tex. Civ. App. 14, 73 S. W. Rep. 981, where the company was held liable for an assault upon a passenger after he had left the train but before leaving the premises, and *Railroad Co. v. Tracey*, 109 Ill. App. 563.

In *Tate v. Railroad Co.*, 26 Ky. L. R. 309, 81 S. W. 256, there was held to be sufficient evidence to go to the jury on the question of the liability of the carrier where a section boss had assaulted a waiting passenger in the presence of the ticket agent.

1. In the case of *Poulton v. The Railway*, L. R. 2 Q. B. 534, in which the action was against the company for false imprisonment by its station-master, the liability of the company was denied, because, as stated by Blackburn, J., "it was an act out of the scope of his authority, and for which the company would no more be responsible than if he had committed an assault or done any other act which the company never authorized him to do. . . . Having no power themselves, they cannot give the station-master any power to do the act. Therefore the wrongful imprison-

stringent construction in favor of the carrier than do the latter cases, which broaden the rule considerably in favor of the passenger.² Arrests that are purely malicious on the part of the carrier's servant will not render the carrier liable in damages

ment is an act for which the plaintiff, if he has a remedy at all, has it against the station-master personally, but not against the railway company." And by Mellon, J., it was said: "I am of the same opinion. I think the distinction is clear; it limits the scope of the authority, to be implied from the fact of being the station-master, to such acts as the company could do themselves, and I do not think it even can be implied that the company authorized the station-master to do that which they have no authority to do themselves; and that seems to me to be the boundary line. It was well put by counsel for plaintiff, and no doubt there is a difficulty at first in seeing where the distinction begins and where it ends; but I cannot help thinking it is analogous to an action against magistrates. If the station-master had made a mistake in committing an act which he was authorized to do, I think, in that case, the company would be liable, because it would be supposed to be done by their authority. Where the station-master acts in a manner in which the company themselves could not be authorized to act, and under a mistake or misapprehension of what the law is, then I think the rule is very different, and I think that is the distinction on which the whole matter

turns. So if the magistrate acts within the scope of his authority, however erroneously he judges of the facts, he is protected; but the moment he assumes a jurisdiction over a matter which does not belong to him, then an action lies. It is a kindred distinction, and I only refer to it for the sake of illustration."

See also, *Roe v. The Railway*, 7 Exch. 36; *Edwards v. The Railway*, L. R. 5 C. P. 445; *Lafitte v. Railroad Co.*, 43 La. Ann. 34. (In this latter case the company was held not liable for the arrest, but liable for the act of the conductor on the car in charging plaintiff with passing counterfeit money.)

In *Mulligan v. Railway Co.*, 129 N. Y. 506, 29 N. E. Rep. 952, 26 Am. St. Rep. 539, 14 L. R. A. 791, reversing 14 N. Y. Supp. 456, it was held by a divided court that a ticket agent who caused the arrest of two persons, who had purchased tickets, on the charge that they had passed counterfeit money which subsequently proved genuine, where it did not appear that the persons arrested were yet under the protection of the carrier with respect to the execution of the contract of transportation, acted without the scope of his authority, and the company was not liable in damages.

2. *Railroad Co. v. Dean*, 98 Tex. 517, 85 S. W. Rep. 1135, 70 L. R. A.

when the arrest does not occur upon the carrier's vehicle,³ but the question whether an arrest was purely malicious or was made under the direction or by the acquiescence of one of the carrier's servants is for the jury.⁴

If the wrongful arrest occurs during the carriage of the passenger upon the carrier's vehicle, and the passenger is hurried from the train and placed in jail, the carrier certainly cannot escape liability for the act of its servant, even though malicious, in having the passenger so arrested, such a case being one in which exemplary damages should clearly be allowed.⁵ As to whether or not a discrimination should be made between the acts of the officer making the arrest while removing the passenger, and his acts after such removal is accomplished, there seems to be a difference of opinion. One court has held that, for the first, the officer making the arrest could be considered the special agent of the carrier for that purpose, while for the latter he could not and the carrier would not be liable.⁶ But another court has held that the imprisonment and detention are the proximate results of the wrongful arrest and may properly be considered by the jury in reaching a verdict.⁷

Sec. 1101. (§ 602.) Liability for indecent assaults on female passengers.—The duty which a carrier owes to a female passenger to protect her from indecent assaults by its servants cannot be frittered away by questions of whether the servants were acting within the scope of their authority. Public policy and public decency require that a more stringent rule should

943, *affirming* (Tex. Civ. App.) Am. St. Rep. 672; *Goff v. The*
82 S. W. Rep. 524; *Gillingham v.* Railway, 3 El. & El. 672.

Railroad Co., 35 W. Va. 588, 14 5. Railroad Co. v. Henry, 55
S. E. Rep. 243, 14 L. R. A. 798, 29 Kan. 715, 41 Pac. Rep. 952, 29
Am. St. Rep. 827; Railroad Co. L. R. A. 465; *Railway Co. v. Con-*
v. Galliher, 89 Va. 639, 16 S. E. der, 23 Tex. Civ. App. 488, 58 S.
Rep. 935; *Moore v. The Railway,* W. Rep. 58; *Schmidt v. Railways*
L. R. 8 Q. B. 36. Co., 116 La. —, 40 So. Rep. 714.

3 *Patterson v. Railroad Co.*, 25 6. Southern Pac. Co. v. Hamil-
Ky. L. R. 1750, 78 S. W. Rep. 870. ton, 54 Fed. 468, 4 C. C. A. 441,

4 *Duggan v. Railroad Co.*, 159 7 U. S. App. 626.

Pa. St. 248, 28 Atl. Rep. 186, 39 7. *Railway Co. v. Conder*, 23

be applied not only while the female passenger is on the carrier's vehicle, but while on the station premises, and the courts have gone to extreme lengths in this regard; as, for instance, where the complaint was by a female passenger that undue and improper liberties had been taken with her by the conductor of a train against her will, and which she alleged to have been an assault upon her person.⁸ The law was held by the learned court, before which the question came, against the company, though the question seems to have been treated as by no means free from difficulty. The fact that the offending agent was the conductor, to whom the plaintiff had the right to look for protection, and a part of whose duty and business it was to compel respectful treatment to the carrier's passengers, was considered as sufficient to affix to his indiscretion the character of misconduct in the line of his duty. The same ruling was followed in another case in which the conductor of the train was guilty of indecorous conduct,⁹ and in a case in which the porter of a sleeping-car made an indecent assault upon a female passenger.¹⁰ So likewise, a carrier was held liable where a female passenger who was waiting at a station to take a train was assaulted by the station agent.¹¹

But if the passenger opened the way for an assault by an immodest or improper remark, while that fact would not justify an assault by the carrier's servant, evidence of it would be properly admissible as affecting an award of punitive damages.¹²

Sec. 1102. Liability of carrier where ill-treatment is provoked by the passenger.—But whilst care and kind treatment

Tex. Civ. App. 488, 58 S. W. Rep. 58. Am. St. Rep. 85, 40 L. R. A. 483.
9. Louisville, etc. R. Co. v.

8. Craker v. The Railroad, 36 Ballard, 85 Ky. 307.

Wis. 657. 10. Campbell v. Car Co., 42 Fed. 484.

The same rule has been applied where a train baggage-master, after locking both doors of the coach, assaulted a female passenger and attempted to commit rape upon her person. Railway Co. v. Quo, 741.

11. Railway Co. v. Griffith, 12 Tex. Civ. App. 631, 35 S. W. Rep. 123.
12. Strother v. Railroad Co., 123 N. Car. 197, 31 S. E. Rep. 386.
103 Ga. 125, 29 S. E. Rep. 607, 68

of the passenger are required of the carrier's servants, decent behavior on the part of the passenger is also required. If the passenger assaults a servant of the carrier, the latter has a right to defend himself; and if, in a personal combat between the two brought on by the passenger's wrongful assault, the passenger is injured, the carrier will not be liable.¹³ But where, by the use of abusive or insulting language only, the passenger provokes an unnecessary assault upon his person by a servant of the carrier, the carrier will nevertheless be liable for the act of his servant, since words of provocation can never justify the unnecessary violence of the servant toward one whom it is the carrier's duty to protect from harm.¹⁴ And although the servant will be justified in using force to repel an attack upon his person by a passenger, no more force must be used by him than is reasonably necessary for his defense and protection and the orderly conduct of the carrier's business.¹⁵ The duty is obligatory upon the carrier to protect the passenger from injury, and not unnecessarily to abuse or mistreat him; and where the carrier seeks to justify an assault by a servant upon the passenger, it will be incumbent upon him to show that no more force was used than was necessary

13. *Railroad Co. v. Jopes*, 142 U. S. 18, 12 Sup. Ct. R. 109, 35 L. R. A. 919; *O'Brein v. Transit Co.*, — Mo. App. —, 84 S. W. Rep. 939; *Scott v. Railroad Co.*, 53 Hun, 414.

14. *Railway Co. v. Mullen*, 138 Ala. 614, 35 So. Rep. 701; *Williams v. Gill*, 122 N. Car. 967, 29 S. E. Rep. 879; *Railroad Co. v. Barger*, 80 Md. 23, 30 Atl. Rep. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220; *Houston, etc. R. Co. v. Batchler*, 32 Tex. Civ. App. 14, 73 S. W. Rep. 981; *St. Louis, etc. R'y Co. v. Johnson*, 29 Tex. Civ. App. 184, 68 S. W. Rep. 58; *Baltimore, etc. R. Co. v. Norris*, 17 Ind. App. 189, 46 N. E. Rep. 554,

60 Am. St. Rep. 166. But see, *contra*, *Railway Co. v. Motes*, 117 Ga. 923, 43 S. E. Rep. 990, 97 Am. St. Rep. 223, 62 L. R. A. 507; *Railroad Co. v. Hopkins*, 108 Ga. 324, 33 S. E. Rep. 965.

Where the passenger knowingly and intentionally violates a rule of the carrier in order to be put off the train and thereby lay the ground for an action for damages, no recovery can be had. *St. Louis, etc. R'y Co. v. Trimble*, 54 Ark. 354, 15 S. W. Rep. 899; *Cincinnati, etc. R'y Co. v. Cole*, 29 Ohio St. 126.

15. *Baltimore, etc. R. Co. v. Barger*, *supra*; *St. Louis, etc. R. Co. v. Jones*, Adm'r, of *Berger*, 64

under the circumstances.¹⁶ But, as will be seen in a later section,¹⁷ the carrier, in an action against him by the passenger for an assault by a servant, may offer proof of the passenger's insulting language or violent conduct, which is claimed to have provoked the assault, in mitigation of damages.

18. *Duty as to beginning, continuing and ending the transportation.*

Sec. 1103. (§ 603.) The time at which the carrier must commence and complete the transportation.—The passenger's ticket does not import a contract that the journey shall be commenced at the particular hour at which, according to the usual course of his business, the carrier has been in the habit of departing from the place at which the passage is to begin; nor that the carrier will transport him to his destination within the usual or expected time. In the absence of any express contract with the carrier upon the subject, all that the passenger can require of him is that due diligence shall be used, so that he shall not be delayed for an unreasonable time, and that when the journey has been once commenced it shall be prosecuted with reasonable speed, according to the particular mode of conveyance in which it is made.¹⁸

Sec. 1104. (§ 604.) Must use diligence to conform to published schedules and notices.—The published schedules or timetables of the carrier, however, are representations to the public as to the times of departure and of the periods within which his journeys will be performed. They are public pro-

Ark. 613, 44 S. W. Rep. 809, 39 L. R. A. 784; Galveston, etc. R'y Co. v. La Prelle, 27 Tex. Civ. App. 496, 65 S. W. Rep. 488; Russell v. The Railroad, 42 N. Y. Supp. 678, 12 App. Div. 160.

But see dissenting opinion in St. Louis, etc. R. Co. v. Jones, Admr., of Berger, *supra*, which distinguishes between civil and criminal actions, and cites Han-

son v. The Railway, 62 Me. 84; Dillingham v. Anthony, (Tex.) 11 S. W. Rep. 139; Peavy v. Banking Co., 81 Ga. 485, 8 S. E. Rep. 70.

16. St. Louis, etc. R. Co. v. Jones, Admr. of Berger, *supra*; Railway Co. v. Mullen, 138 Ala. 614, 35 So. Rep. 701.

17. See *post*, § 1434.

18. Wilsey v. Railroad Co., 83 Ky. 511.

fessions, up to which he must use diligence to act, and if he fail to perform his trips according to them, he will be liable to the passenger, unless he shows that he has made reasonable exertions to do so and has been prevented by accidents and delays not attributable to his negligence.¹⁹ In *Heirn v. McCaughan*,²⁰ it appeared that the defendant ran a steamer for the carriage of the mails and passengers between New Orleans and Mobile, landing at intermediate points on the coast for passengers whenever he advertised to do so, and that on the particular occasion he advertised at Pascagoula that he would land at that place for passengers. Acting upon this notice, the plaintiff's wife and himself went during the night to the wharf to take passage on defendant's vessel, and remained there in waiting for it during the balance of the night; but the boat did not land, in consequence of which they were not only greatly disappointed, but, owing to the inclemency of the weather and the exposure, the plaintiff's wife was made sick. The excuse offered by the defendant for not making the landing according to his published notice was that, owing to the low tide and stormy weather, the vessel could not have been landed without danger, and without causing a delay in the delivery of the mail at Mobile. It was held, however, that while these circumstances gave rise to no special contract between the plaintiff and defendant, they did impose an obligation upon the latter, the disregard of which was a breach of duty, for which he could be sued in an action in tort; and that there being evidence of a wilful and capricious failure

19. *Coleman v. Railway Co.*, 138 N. Car. 351, 50 S. E. Rep. 690.

As to the right of a state railroad commission to compel a company to have its train arrive at a certain station on its road at a given time in order to connect with a train of another company, see *North Carolina Corp. Commission v. Railroad Co.*, 137 N. Car. 1, 49 S. E. Rep. 191.

If a railroad company changes

its schedule but gives no notice of that fact to its local agent who sells a ticket for a train taken off, the company will be liable to the purchaser of the ticket if injured by such failure to run the train in accordance with the printed schedule and the representation of the agent. *Van Camp v. Railway Co.*, 137 Mich. 467, 100 N. W. Rep. 771.

20. 32 Miss. 17.

to comply with the notice, from which the plaintiff and his wife were sufferers, and as no evidence whatsoever was given of any effort by the defendant to land his boat as he had advertised, the case was properly submitted to the jury, whose province it was to determine whether there had been such wilful neglect of duty as to warrant exemplary damages.

Sec. 1105. (§ 605.) Same subject.—And so where a railroad company delayed the departure of its train for about two hours after its advertised time, for the accommodation of a number of its patrons who wished to attend a performance at the theater and to be carried home after it was over, a ticket-holder who went to its depot to be carried at the advertised time was allowed to recover from the company his expenses in being carried to his destination in a hired conveyance, which he preferred to employ rather than submit to the delay.²¹

Sec. 1106. (§ 606.) Same subject.—So, in another case, where the plaintiff, having purchased a ticket for his passage over the road of a railway company, and having gone to its station to take the train at the time advertised in its time-table for starting, found that, owing to a change in the schedule of a connecting road, the train upon which he expected to go had been discontinued, of which no public notice had been given; and by reason of the delay thus occasioned he did not reach his destination in season for his business, and suffered a pecuniary loss, it was held that he was entitled to recover. The learned judges differed, however, upon the question whether the publication of the time-table amounted to a contract with the ticket-holder that a train should be in readiness to receive and carry him at the appointed time; but they all agreed that if there was not a contract, there was at least a representation, which having turned out to be false, the company was liable to an action as for a deceit.²²

²¹ *Sears v. The Railroad*, 14 Allen, 433.

Savannah, etc. R. Co. v. Bonaud, 58 Ga. 180.

²² *Denton v. The Railway*, 5 El. & Bl. 860. To same effect,

Where the carrier's time-table announced that every attention

Sec. 1107. (§ 607.) Same subject.—But the mere taking a ticket does not of itself prove a contract upon the part of the company, or impose upon it the duty to have a train ready to start at the time at which the passenger is led to expect it;²³ and in order to maintain an action for its failure to do so he must show the breach either of an express contract or of a legal obligation created by its published time-tables or notices;²⁴ nor does the advertisement of schedules or time-tables impose upon the carrier an absolute and unconditional undertaking to carry the passenger as he may be led by them to expect.²⁵ In *Gordon v. The Railroad*,²⁶ where the subject is learnedly examined, the facts were that the plaintiff held a ticket to be carried from a way-station to the terminus of the road; but when the train upon which he expected to be carried reached the station, being so crowded with passengers that there was no room for the plaintiff (which, being an unexpected occurrence, the road had not provided for), and being besides upon an ascending grade, which would have made it extremely difficult to start it again, it was not stopped for the plaintiff. He was therefore compelled to lie over, and brought an action against the company for the damages sustained by him in consequence of the detention; but it was held that the

would be paid to insure punctuality, but that the company did not undertake that trains would start or arrive at times stated, it was held that the company was liable for an unreasonable delay. *Le Blanche v. Railway Co.*, 1 C. P. Div. 286.

Though the train is behind time, the company is not liable where the train is blown from the track by a sudden gust of wind which it would have escaped had it been on time. This is not the natural and direct result of the delay. *McClary v. Railroad Co.*, 3 Neb. 44.

23. When the laws of a state

permit fewer trains to be run on Sunday than on a week day, it becomes more particularly the duty of a passenger to consult the schedules of the company. *Stricker v. Railroad Co.*, 60 N. J. Law 230, 37 Atl. Rep. 776.

24. *Hurst v. The Railway*, 19 C. B. (N. S.) 310.

25. The carrier is not liable for mere failure to transport within the time advertised on account of a washout on the road not the result of the carrier's fault. *Railway Co. v. Rogers*, 16 Tex. Civ. App. 19, 40 S. W. Rep. 201.

26. 52 N. H. 596.

published time-tables of the company imposed upon it no further obligation than to use due care and diligence to be punctual in its departures and arrivals, and in the carrying of its passengers according to such tables, and that the failure in this instance to carry the plaintiff as he had been led by them to expect, not being attributable to the negligence of the company, he could not recover. "In this country," it was said, "nearly all railroads publish time-tables, and delays not attributable to negligence are not uncommon; yet suits to recover damages for detention in such cases are almost, if not quite, unknown. That such actions are almost unprecedented shows very strongly what has been understood to be the law upon the subject."²⁷

Sec. 1108. How when a train is late—Statements of agent as to when it will arrive or depart.—When a train is late, an intending passenger has no right to rely upon the statement of the station agent as to the exact time that it is late and infer from such statement that the train will pass his station just that much later. Thus if he is told by the agent that his train is an hour late when it arrives but forty-five minutes late, and he goes away to get his dinner and is left, the carrier is not liable in damages to him.²⁸

Sec. 1109. (§ 608.) Liability for detention of the passenger.—The liability of the carrier, however, for the detention of the passenger upon the passage after it has been commenced has been held to exist in a number of instances; and whether this detention has been occasioned by the negligence of the carrier himself or of his servants, or from the wilful misconduct of an employe whose duty it is to superintend and direct the forwarding of the conveyances upon which the passenger is to be

27. And see this case for a criticism upon the case of *Hawcroft v. The Railway*, 8 Eng. L. & Eq. 362, which it is said is the only case which can be cited to sustain the position that the pub-

lished times for the departures of trains amount to an unconditional contract between the carrier and the passenger.

28. *Railway Co. v. Allender*, 59 Ill. App. 620.

carried, can make no difference.²⁹ In *Weed v. The Panama Railroad*³⁰ the plaintiff and his wife were passengers on a train which was wilfully and unnecessarily stopped on its route by the conductor during a stormy night, and they, with a great number of other passengers, were obliged to remain upon it until the next day from inability to procure other accommodations. The plaintiff's wife was taken sick from the effects of the exposure and experienced "great suffering. The only ques-

29. *Quimby v. Vanderbilt*, 17 N. Y. 306; *Williams v. Vanderbilt*, 28 *id.* 217; *Van Buskirk v. Roberts*, 31 *id.* 661; *Cobb v. Howard*, 3 *Blatch.* 524; *Hamlin v. The Railway*, 1 H. & N. 408; *Hobbs v. Railway Co.*, L. R. 10 Q. B. 111.

In *Eddy v. Harris*, 78 Tex. 661, 15 S. W. Rep. 107, one Sparks had arranged for an excursion train on a given day over a road of which Eddy and others were receivers. Sparks had tickets printed stating that they were good on the train, and signed by him as manager. These tickets were placed on sale at the regular ticket office. Harris, desiring to go on the excursion train, bought one of these tickets of the ticket agent, not knowing that Sparks had anything to do with the train. After going part way, the road officials refused to send the train further because Sparks failed to make certain payments he had agreed to make before the train should start. Harris was delayed, had to pay extra fare and to come home on a train earlier than the excursion train would have run, and thereby lost some of the pleasure of the occasion. The court held that the receivers were liable, as by accepting her

money a contract to carry on that train was created; that it was doubtful if Sparks' contract affected the question, and that if it did, the act of the agent in selling the ticket must be taken as an affirmation on the part of the road that he had complied with his contract and that the train would run.

In England, a condition incorporated in a ticket issued by a railway company to a passenger that the railway company will not "under any circumstances be held reponsible for delay or detention, however occasioned, or any consequences arising therefrom," protects the company from liability for delay or detention of the passenger, even when caused by the admitted negligence of the company. Consequently, where a workman takes a ticket issued subject to the above condition, and in consequence of the negligence of the company he is late in arriving at his destination, and so loses his day's work and his day's wages, he cannot recover the amount of his loss from the company. *Duckworth v. Railway Co.*, 84 Law T. 774, 49 Wkly. Rep. 541.

30. 17 N. Y. 362.

tion was said to be whether the company could defend itself by showing that the delay on the route was the wilful wrong of one of its servants. "Viewing the general question," said the court, "as it appears to be clear we must, as being whether the defendants have disregarded their duty as carriers, and the particular point of inquiry, whether the circumstance that the detention was a wilful act of their servant will excuse what would otherwise be a want of proper diligence, this part of the case is relieved from difficulty. If the detention had resulted from negligence of the conductor, the liability of the defendants would be unquestionable. . . . No reasons exist for holding a master liable for injuries from the negligence of his servants in his employment which do not equally and with like force preclude him from alléging an intentional default of a servant as an excuse for delay in the performance of a duty the master has undertaken;" and the conclusion was that it was immaterial whether the act was wilful or negligent, and that in either aspect of the case the company was liable.

If, therefore, there has been any delay in transporting the passenger, the burden of proof is upon the carrier to show that the cause of delay did not arise from his negligence.³¹ And, even though the delay be unavoidable, that high degree of care imposed upon a carrier of passengers by law would require him to adopt all reasonable means for the comfort and safety of his passengers, and to extricate them from any dangerous situations in which they have been placed.³²

Sec. 1110. (§ 608a.) Duty to stop trains for passengers at regular or flag stations and at passenger platforms.—As has been seen, the carrier by railroad is not obliged, except by statute, to stop all of its passenger trains at every station.³³

31. This has been held where the train was delayed by a wreck, and the burden of proof was held to be on the carrier to show that such wreck was not due to his own negligence. *Railroad Co. v. Harder*, (Tex. Civ. App.) 81 S. W. Rep. 356.

32. *Railway Co. v. Rogers*, 16 Tex. Civ. App. 19, 40 S. W. Rep. 201.

33. *Ante* § 1060.

A state statute requiring each railroad to cause three, each way, of its regular trains carrying passengers, if so many are run daily,

But it is bound, both by common law and usually by statute, after providing reasonable facilities for the transportation of passengers and arranging its schedules for the running of its trains, to stop at its regular stations to receive passengers upon such of its passenger trains as by its schedules are advertised to stop at such stations.³⁴ So where passenger trains are in the habit of stopping at a flag station whenever proper signals are given, a railroad company is bound to stop a passenger train on a proper signal.³⁵

And, in the absence of unusual circumstances, it is bound to stop its trains at the platform prepared for the use of passengers.³⁶ In the case of freight trains, however, a different rule is permissible, and it is held not to be an unreasonable regulation that passengers wishing to ride upon freight trains shall be received at some other place than the regular platform used for passenger trains, but that where this is the rule, the way from the station where tickets are procured to the place where the passenger is to be admitted to the train must be in a safe condition for transit, and passengers may rely upon the presumption that it is so.³⁷

Sundays excepted, to stop at a station, city or village containing over three thousand inhabitants, for a time sufficient to receive and let off passengers, is valid, in the absence of Congressional legislation on that subject and is not repugnant to the constitution of the United States when applied to interstate trains carrying interstate commerce. *Railway Co. v. Ohio*, 173 U. S. 285.

But a state statute, which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States by compelling a fast mail train to turn aside from the direct interstate route, and run to a station three miles and a half away from a point on that route and back again to the same point, and thus

travel seven miles, which form no part of its course, before proceeding on its way, cannot be considered as a reasonable police regulation. *Railroad Co. v. Illinois*, 163 U. S. 142.

34. *Purcell v. Railroad Co.*, 108 N. Car. 414, 12 S. E. Rep. 954, 956; *Heirn v. McCaughan*, 32 Miss. 17; *Indianapolis, etc. R'y Co. v. Birney*, 71 Ill. 391; *Ballard v. Railroad Co.*, 15 Ky. L. R. 703.

35. *Railroad Co. v. Siddons*, 53 Ill. App. 607; *Thomas v. Railway Co.*, 122 N. Car. 1005, 30 S. E. Rep. 343; *Railway Co. v. Safford*, (Tex. Civ. App.) 48 S. W. Rep. 1105; *Freeman v. Railroad Co.*, 65 Mich. 577.

36. *Post*, § 1117 and notes.

37. *Browne v. Railroad Co.*, 108 N. Car. 34, 12 S. E. Rep. 958;

Unusual circumstances, such as accident or unexpected stress of business, may justify the carrier in requiring passengers to enter passenger trains at some point away from the regular station or platform; but where this is the case the carrier must see to it that the place selected is not an unsafe one,³⁸ and, where assistance is necessary, that the passenger has such assistance as is reasonably necessary to enable him to get on the car in safety.³⁹

Sec. 1111. (§ 608b.) Passenger must be allowed reasonable opportunity to enter vehicle in safety.—It is the duty of the carrier to furnish to passengers a reasonable opportunity to enter its vehicles in safety. The duty of furnishing safe vehicles and proper platforms and other stational facilities has already been considered. But having furnished these, it has not performed its full duty unless a reasonable opportunity be given to those who wish to become passengers, to leave the stations, waiting-rooms or platforms as provided and to get in safety upon the vehicle furnished for their transportation. The extent of this duty must depend largely upon the circumstances of the case, differing greatly when but one train of cars, for example, is about to leave a small station at which there is but a single track, and when a train is about to leave the union depot in a great city where many trains are constantly coming in and going out in various directions, some local and some limited, where there are many tracks and great bustle and confusion, and where everything tends to confuse and bewilder those not accustomed to much traveling. Under

Railway Co. v. Neal, 66 Ark. 543, 51 S. W. Rep. 1060; Simmons v. Railway Co., 41 Ore. 151, 69 Pac. Rep. 440, 1022; Railroad Co. v. Maxwell, 59 Ill. App. 673; Railroad Co. v. Stonecipher, 90 Ill. App. 511; Railway Co. v. Brown, 46 Ill. App. 137; s. c. 49 Ill. App. 40; Hays v. Railway Co., 51 Mo. App. 438. traveling with their stock. Railway Co. v. Lagerkraus, 65 Neb. 566, 91 N. W. Rep. 358, 95 N. W. Rep. 2; Railway Co. v. Hudman, 8 Tex. Civ. App. 309, 28 S. W. Rep. 388.

38 Baltimore, etc. R. Co. v. Kane, 69 Md. 11; Missouri Pac. R'y Co. v. Watson, 72 Tex. 631.

39. Post, § 1112, 1127.

This rule applies to stockmen

the latter circumstances the duty of the carrier may reasonably include the due and timely announcement of particular trains, the furnishing of proper directions by which to reach them, and the taking of suitable precautions to prevent passengers from entering the wrong train or car.⁴⁰

In any event, however, the duty of the carrier will require the stopping of the train for such a reasonable time as will permit prior passengers to alight in safety, and those wishing to enter, and who present themselves at the proper time and place for that purpose, to do so with equal safety. The carrier will not be required to delay an unreasonable time,⁴¹ or to wait for passengers who have not arrived at the time fixed for depar-

40. See *Allender v. Railroad Co.*, 43 Iowa, 276; *McKimble v. Railroad Co.*, 139 Mass. 542; *Marshall v. Railway Co.*, 78 Mo. 610, 616. As to duty to give directions, see also, *post*, § 1129.

It is the duty of those in charge of the train to see that all passengers or those manifestly intending to board the train are safely upon it before giving the signal to start. *Hatch v. Railway Co.*, 212 Penn. St. 29, 61 Atl. Rep. 480.

41. Railway trains should stand at the station at which they are made up a reasonable time before their departure, to permit passengers to enter them; usually twenty or thirty minutes is more than can reasonably be demanded; and until it becomes necessary to put them in position to await passengers, there is no negligence in moving them back and forth as the convenience of the company in making up and stationing other trains may require. *Flint, etc. Ry Co. v. Stark*, 38 Mich. 714.

The purchase of a general ticket does not give the passenger an

absolute right to take any particular train. He must be on hand ready to take the train when the hour of departure arrives, and if not there, he has no right to have the train delayed till he can reach it. *Paulitsch v. Railroad Co.*, 102 N. Y. 280.

Notwithstanding the fact that a passenger train may have stopped a length of time sufficient for passengers to board same, if a passenger be induced by one in charge or authority to board the train, the carrier is bound to hold the train a time sufficient to enable such person to get safely upon it. *Railway Co. v. Horn*, 132 Ala. 407, 31 So. Rep. 481.

If a passenger gets on a train after the signal is given for starting it, but before the train has started, and is injured in so doing, evidence that the car doors were locked until just before starting is admissible as bearing on the question of due care on the part of the passenger in not attempting to enter the train sooner, and also on defendant's negligence in not having the doors

ture;⁴² but if it does not furnish reasonably safe means of entering the car,⁴³ or if, while the passenger is in the act of getting on, the train is negligently started and the passenger is injured, the carrier will be liable.⁴⁴

But the carrier is under no duty, after the passenger has fairly entered the vehicle, to hold the train until the passenger has had time to reach a seat, unless there be some special reason for so doing, as where the passenger is weak or otherwise infirm of which fact the carrier must have notice.⁴⁵ But all passengers, strong or weak, have a right to assume that other cars will not be backed against those which they are upon in such a manner as to endanger their safety while proceeding to their seats,⁴⁶ or that the train or car will not be given an

opened sooner. *Dawson v. Railroad Co.*, 156 Mass. 127, 30 N. E. Rep. 466.

42. See *Swan v. Railroad Co.*, 132 Mass. 116; *St. Louis, etc. R. Co. v. South*, 43 Ill. 176.

43 *Missouri Pac. R'y Co. v. Watson*, 72 Tex. 631.

44. *McQuade v. Railway Co.*, 53 N. Y. Super. 91; *Lee v. Railway Co.*, *id* 260; *Gilbert v. Railway Co.*, 54 N. Y. Super. 270; *Ganiard v. Railroad Co.*, 50 Hun, 22; *Morison v. Railroad Co.*, 8 N. Y. Suppl. 436; *Baltimore, etc. R. Co. v. Kane*, 69 Md. 11, 17 Atl. Rep. 1032; *Central R'y Co. v. Smith*, 74 Md. 212, 21 Atl. Rep. 706; *Railway Co. v. Gardner*, 114 Fed. 186, 52 C. C. A. 142; *Railroad Co. v. Siniard*, 123 Ala. 557, 26 So. Rep. 689; *Poole v. Railroad & B. Co.*, 89 Ga. 320, 15 S. E. Rep. 321; *Railroad Co. v. Drake*, 33 Ill. App. 114; *Railroad Co. v. Reeves*, 25 Ky. L. R. 2236, 80 S. W. Rep. 471; *Cook v. Railroad Co.*, 65 Hun, 619, 19 N. Y. Suppl. 649; *Daley v. Railroad Co.*, 80 Hun, 174, 29 N. Y. Suppl. 1011; *Hatch v. Railway*

Co., 212 Pa. 29, 61 Atl. Rep. 480; *Railroad Co. v. Anchonda*, 5 Tex. Ct. R. 289, 68 S. W. Rep. 743; *Railway Co. v. Cannon*, (Tex. Civ. App.) 81 S. W. Rep. 778; *Railway Co. v. Gray*, 6 Tex. Ct. R. 332, 71 S. W. Rep. 316; *Railway Co. v. Mayfield*, 23 Tex. Civ. App. 417, 56 S. W. Rep. 942; *St. John v. Railway Co.*, (Tex. Civ. App.) 80 S. W. Rep. 235; *Railroad Co. v. Groseclose's Adm'r*, 88 Va., 267, 13 S. E. Rep. 454, 29 Am. St. Rep. 718.

45. *Railway Co. v. Webster*, 21 Ky. L. R. 3, 50 S. W. Rep. 843; *Railroad Co. v. Hale*, 102 Ky. 600, 44 S. W. Rep. 213; *Yarnell v. Railroad Co.*, 113 Mo. 570, 21 S. W. Rep. 1, 18 L. R. A. 599.

In *Railway Co. v. Holloway*, (Tex. Civ. App.) 54 S. W. Rep. 419, where the passenger was a cripple on crutches, which fact the carrier's servants knew, the carrier was held liable when sufficient time was not allowed for him to safely enter the car and take his seat.

46. *Moore v. Railroad Co.*, 119

extraordinary jerk or jar whereby they are thrown down and injured.⁴⁷

Owing to the greater danger to passengers while traveling on freight trains, a railroad company carrying passengers on its freight trains must afford sufficient time for the passenger, in the exercise of due diligence, to get upon the vehicle and to reach a place of safety inside the caboose;⁴⁸ but if such time has elapsed, and the passenger has delayed in obtaining a seat and is injured by a jolt, the jolt not being unusual to such trains, his injury will be attributable to his own fault.⁴⁹

Where a passenger leaves the train temporarily for some purpose, such as to procure a ticket, under the direction of or with the acquiescence of the conductor, it is the conductor's duty to allow him a reasonable time in which to affect his purpose and return to the train before starting.⁵⁰ The same rule holds true as to a through passenger who leaves the train temporarily at an intermediate station,⁵¹ or as to a stockman who is required by the rules of the carrier to sign a written contract after loading his stock.⁵²

Mich. 613, 78 N. W. Rep. 666. In this case it is said that the passenger is not chargeable with negligence *per se* in failing to see whether other cars are backing on the same track or in failing to take the first seat he comes to.

47. *Sheffer v. Railway Co.*, 22 Ky. L. Rep. 1305, 60 S. W. Rep. 403.

48. *Kelly v. Railway Co.*, 108 La. 423, 32 So. Rep. 388.

For the rule in reference to stage coaches, see, *Halle v. Clayton & Hoff Co.*, 61 N. J. L. 197, 38 Atl. Rep. 805.

49. *Railway Co. v. Moore*, 108 Ga. 84, 33 S. E. Rep. 889.

50. *Railway Co. v. Gist*, 31 Tex. Civ. App. 662, 73 S. W. Rep. 857; *Foreman v. Railway Co.*, 4 Tex. Civ. App. 54, 23 S. W. Rep. 422;

Railway Co. v. Germany, (Tex. Civ. App.) 56 S. W. Rep. 586; *Johnson v. Railroad Co.*, — Tex. Civ. App. —, 93 S. W. Rep. 434.

This rule has been applied where there was a wreck on the road and the passenger left the train with the acquiescence of the conductor. *Railway Co. v. Roundtree*, (Tex. Civ. App.) 25 S. W. Rep. 989.

51. *Railway Co. v. Humphreys*, 25 Tex. Civ. App. 401, 62 S. W. Rep. 791.

52. *Railway Co. v. Brown*, 49 Ill. App. 40, 46 Ill. App. 137; *Railroad Co. v. Beebe*, 174 Ill. 13, 50 N. E. Rep. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253, *affirming* 69 Ill. App. 363.

The questions concerning the particular circumstances of each case are usually questions that should be submitted to the jury under proper instructions from the court.⁵³

Sec. 1112. Helping passengers to enter train.—While ordinarily, where access to the train is not difficult, there may be no duty resting on the carrier to afford assistance to passengers in boarding a train,⁵⁴ still there may be circumstances such as to make it incumbent on the carrier's servants to render such assistance. Thus where the train had stopped an insufficient time at the platform provided for passengers to board the train, and the train had moved to a place where it could be boarded only with considerable difficulty owing to the height of the car steps from the ground, and a female passenger was invited by the carrier's servants to board the train at such point, it was held to be the carrier's duty to render her such assistance as was necessary to enable her to board the train.⁵⁵

Sec. 1113. (§ 609.) Carrier must furnish sufficient room and reasonable accommodations—Right of passenger to a seat before surrendering ticket.—The carrier is bound to furnish his passengers with sufficient room, and with all the usual and reasonable accommodations for their comfort, which they have the right to expect from the ordinary usages upon conveyances of the kind employed by him, and to which such conveyances are adapted. Failing to do so, he is liable for a breach of his contract, and for such damages as the passenger has thereby sustained.⁵⁶

A carrier, therefore, by the customary conveyances employed in land travel, is usually bound to furnish the passen-

53. *Doyle v. Railroad Co.*, 82 Fed. 869, 27 C. C. A. 264, 50 U. S. App. 249; *Kulman v. Railroad Co.*, 65 N. J. Law, 241, 47 Atl. Rep. 497.

54. *Yarnell v. Railroad Co.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599.

55. *Railroad Co. v. Voils*, 98 Ga. 446, 26 S. E. Rep. 483, 35 L. R. A. 655; *Railroad Co. v. Cheek*, 152 Ind. 663, 53 N. E. Rep. 641.

56. "As a general rule and under ordinary circumstances," says the court in Pennsylvania, "it is the duty of the carrier to pro-

ger with a seat, on the latter's request, if it is within his power to do so.⁵⁷ But it is not negligence *per se* for a carrier to fail to furnish a passenger with a seat. Such a failure is only evidence of negligence to be weighed by the jury. There are circumstances under which a passenger might prefer to enter a car and stand up, rather than not make the journey. In such case it cannot be said as a matter of law that the carrier is negligent in permitting him to exercise such privilege.⁵⁸

If the carrier has advertised excursions, and, in the nature of things, should expect a large crowd, it is his duty to exercise a high degree of care to furnish a sufficient number of cars with a view to the comfort and safety of the passengers. If the carrier has not room for the passenger, he should not contract to carry him; and if it be uncertain whether he will

vide suitable car accommodations and seats for those whom it undertakes to carry; and if a passenger, exercising reasonable care and prudence, is injured in consequence of the carrier's neglect of duty in that regard, the latter is liable for the injury occasioned solely by its own negligence." *Camden, etc. R. Co. v. Hoosey*, 99 Penn. St. 492.

See also, *Railway Co. v. Rea*, 7 Tex. Ct. R. 888, 74 S. W. Rep. 939; s. c. 27 Tex. Civ. App. 549, 65 S. W. Rep. 1115; *Graham v. McNeill*, 20 Wash. 466, 55 Pac. Rep. 631, 43 L. R. A. 300, 72 Am. St. Rep. 121.

57. In *Railway Co. v. Patterson*, 69 Miss. 421, 13 So. Rep. 697, 22 L. R. A. 259, the plaintiff boarded a car in which there was no seat vacant, some sleeping passengers, however, occupying two seats and other passengers having filled available seats with their baggage. The plaintiff requested the conductor to provide him with a seat but that official refused. Plain-

tiff thereupon left the train. The court held that since the plaintiff had paid for a seat, he was entitled as a matter of right to have the servants of the railway company provide him with one unless a sudden and unusual influx of passengers rendered that impracticable, and under the circumstances shown, the conductor could and should have made provision for seating plaintiff. The company was held liable in damages.

58. *Railroad Co. v. Bryant*, (Tex. Civ. App.) 72 S. W. Rep. 885; *Olivier v. Railroad Co.*, 43 La. Ann. 804, 9 So. Rep. 431.

The mere failure to provide a seat is not sufficient to charge a carrier with liability for an injury to a passenger who is thrown down by a sudden shock to the vehicle. It must further appear that there was not sufficient provisions for as many passengers as customarily and ordinarily, required them. *Burton v. Ferry Co.*, 114 U. S. 474.

have the necessary room, he should make his contract conditional with reference to the uncertainty. Otherwise he will be liable to damages for the failure to carry, although it may be impossible for him to do so for the want of room.⁵⁹

The passenger upon a railroad car, of course, is not bound to surrender his ticket to the conductor, in obedience to a regulation of the company, until he has been furnished with a seat.⁶⁰ But while the passenger may refuse to surrender his ticket until furnished with a seat, he cannot insist on riding without a seat and without giving up his ticket. He must either leave the train and keep his ticket, or surrender his ticket and accept such accommodations as the carrier can furnish. In other words, he cannot insist on riding free while standing.⁶¹

Sec. 1114. (§ 610.) Same subject—Extraordinary and unexpected demand will excuse.—It has been held, however, that railroad companies cannot refuse to carry those who apply to be carried, or those who have become entitled to be carried by becoming the holders of their tickets, for the want of room, because their trains are capable of extension by the addition of sufficient coaches for the accommodation and carriage of as many as may apply to be carried.⁶² But such a rule could certainly have no application when the refusal was *bona fide* for the want of room at a way-station at which such additional coaches were not provided, if the company had made arrangements at starting to accommodate as many travelers as might be reasonably expected to apply. And any unexpected or extraordinary circumstance occasioning the necessity for taking on an unusual number of passengers, by which its vehicles

59. *Williams v. Railroad Co.*, 28 Tex. Civ. App. 503, 67 S. W. Rep. 1085.

60. *Davis v. Railroad Co.*, 53 Mo. 317; *St. Louis, etc. R. Co. v. Leigh*, 45 Ark. 368; *Hardenbergh v. Railway Co.*, 39 Minn. 3; *Memphis, etc. R. Co. v. Benson*, 85 Tenn. 630.

61. *St. Louis, etc. R. Co. v. Leigh*, 45 Ark. 368; *Hardenbergh v. Railway Co.*, 39 Minn. 3; *Memphis, etc. R. Co. v. Benson*, 85 Tenn., 630.

62. *The Great Northern R'y Co. ads. Hawcroft*, 8 Eng. L. & E. 362; *Lafayette, etc. R. R. v. Sims*, 27 Ind. 59.

were filled before the person desiring to be carried had applied, under circumstances which made it impossible to remedy the inconvenience, would, as in the case of the refusal to accept goods for carriage by the common carrier, excuse the refusal to carry persons as passengers, by railway companies as well as other passenger carriers.⁶³

Sec. 1115. Same subject—When passengers are carried in baggage car.—Where a passenger has acquired a contract right to be conveyed in one of the carrier's passenger coaches, but he is invited to ride in a baggage car, it must appear that the carrier has availed himself of all the means at hand to procure a passenger coach for the accommodation of the passenger before he will be justified in using a baggage car for such purpose.⁶⁴

Sec. 1116. (§ 611.) Carrier must allow customary intervals for refreshment and give notice of departure.—The carrier is also required, where the length of the journey makes it necessary, to allow the customary intervals, and at the usual places, for refreshment of his passengers; and such usages cannot be varied at his pleasure or caprice; for every passenger is understood to contract for the usual reasonable accommodations of this kind, and they may have been the reasons for preferring his conveyance to the less convenient arrangement of another carrier.⁶⁵ And when the carrier has stopped his conveyance temporarily on the route for such purpose, or for any other, he cannot start again without giving due warning to the passengers who may have taken advantage of the delay to leave the conveyance during its continuance.⁶⁶

63. *Gordon v. The Railroad*, 52 Co., 34 La. Ann. 777; *Jefferson-N. H.* 596; *Burton v. Ferry Co.*, 114 U. S. 474. *ville, etc. R. Co. v. Riley*, 39 Ind. 568.

64. *Railroad Co. v. Swann*, 81 Md. 400, 32 Atl. Rep. 175, 31 L. R. A. 313. 66. *State v. The Railway*, 58 Me. 176; *Mitchell v. The Railroad*, 30 Ga. 22. *Pitcher v. Railway Co.*, 8 N. Y. Suppl. 389.

65. Story on Bail. § 597. See, also, *Dodge v. Steamship Co.*, 148 Mass. 207; *Peniston v. Railroad* by a passenger how long the train

Sec. 1117. (§ 612.) Passenger must be put down at usual place of stopping.—The passenger is entitled not only to be properly carried, but he must be carried to the end of the journey for which he has contracted to be carried, and must be put down at the usual place of stopping;¹ and in an old case it

will stop at a certain station at which they are just arriving, and the conductor says five minutes, the company will not be liable to the passenger who is left behind because the train does not wait five minutes where the passenger does not tell the conductor that he intends to get off. *Missouri Pac. R'y Co. v. Foreman*, 73 Tex. 311.

But after stopping at a wood station for wood, the carrier is not bound to give notice to passengers before starting. *Malcolm v. Railroad Co.*, 106 N. C. 63.

1. *Dudley v. Smith*, 1 Camp. 167; *Ker v. Mountain*, 1 Esp. 27; *Railroad Co. v. Martelle*, 65 Neb. 540, 91 N. W. Rep. 364; *Caldwell v. Railroad Co.*, 89 Ga. 550, 15 S. E. Rep. 678; *Hoyt v. Railway Co.*, 112 Mich. 638, 71 N. W. Rep. 172, 9 Am. & Eng. R. Cas. (N. S.) 818.

This statement of the rule has been approved by the Supreme Court of Indiana. *White Water R. Co. v. Butler*, 112 Ind. 598. In this case a mixed train, carrying both passengers and freight, and scheduled to stop for both at M., stopped for passengers to alight at a switch or side-track near the station, but not at the depot. The plaintiff, who was a passenger for that station on that train, did not get off there, but waited, expecting the train to stop at the depot. The name of the station was not called at the switch, nor was any

invitation given to passengers to alight there. The train passed the depot without stopping, and when it had gone about half a mile the plaintiff was ejected. "These facts," said the court, "entitled the appellee to a recovery. It was the duty of the carrier to stop at the depot where passengers were usually received and discharged. A right to be carried from one regular station to another includes the right to a safe alighting place at the depot of the carrier, kept and used for that purpose. A person buying a ticket entitling him to passage to a town or city cannot be required to alight at any part of the town or city it may please the carrier to stop, but he is entitled to be carried to the regular depot of the carrier. The carrier's duty is not discharged when an opportunity is offered the passenger to alight alongside of a switch or side-track distant from the usual and regular alighting place." The court here quote the rule of the text, saying: "The authorities fully support the author's statement of the law. *Terre Haute, etc. R. R. Co. v. Buck*, 96 Ind. 346. It is probably true that a railroad company may make a distinction between trains employed exclusively in transporting passengers and those employed in carrying both freight and passengers, and require passengers on

has been held that, when such usual place was an inn yard, it was not sufficient to put him down outside of the gateway of the inn. If the carrier refuses without good reason² to put him down at the usual stopping place, the passenger will have a right of action for all damages he sustains thereby, and especially would this be true where the refusal is malicious.³ So the passenger is entitled to have the train come to a full stop at his destination, and not merely to a slackening of speed, for, if the carrier accepts fare to a particular place, he is bound to stop there,⁴ unless the carrier's servant accepted the fare in violation of the carrier's express regulations.

We have already noted that it is the duty of one about to take passage upon the carrier's conveyance to ascertain for himself whether it will carry him and put him off at the destination to which he wishes to be carried.⁵ Following the

the latter trains to alight at a safe place other than the regular depot; but unless a distinction is made, the passenger has a right to be carried to the regular depot. We decide this case, as the evidence fully warrants us in doing, upon the theory that no distinction was made between the two kinds of trains, and, proceeding on this theory, adjudge that it was the appellant's duty to stop at the regular depot a sufficient length of time to allow the appellee to alight in safety."

One who takes passage upon a freight train to a designated city is entitled to carriage thereon only to the point or place in such city or its suburbs at which the run of the train upon its usual and regular schedule is terminated, and cannot demand the right to be transported thereon to a station to which only passenger trains are carried for the discharge of passengers. *Railway*

Co. v. Howard, 111 Ga. 842, 36 S. E. Rep. 213.

2. The carrier will not be liable for refusing to stop at a station to permit passengers to alight where its failure to do so is brought about by the drifting of snow upon the track in front of the station platform, and the train stops at a more favorable place some distance beyond. *Reed v. Railway Co.*, 100 Mich. 507, 59 N. W. Rep. 144.

3. The carrier is liable for refusing to stop at a customary stopping place to let a passenger off where he does so to retaliate upon the passenger for not giving him his business. *Brulard v. Alvin*, 45 Fed. Rep. 766.

4. *Railway Co. v. Bandy*, 120 Ga. 463, 47 S. E. Rep. 923.

5. See *ante*, § 1060.

Also, *Pittsburgh, etc. R'y v. Nuzum*, 50 Ind. 141; *Ohio, etc. R. v. Hatton* (Sup. Ct. of Indiana), 6 Cent. L. Jour. 389, May

same line of reasoning it has consequently been held that, if according to the regulations of a railroad company, the train upon which the passenger is being carried does not stop at the station at which he wishes to get off, the conductor has no authority to bind the company by a promise to do so for the accommodation of the passenger. Such a power cannot be implied as within the proper duties of a conductor, nor would it be consistent with public policy. A railroad company which holds itself out as a common carrier of passengers, establishes its route stations, and advertises its running arrangements, thereby pledges itself to the public to run accordingly; and if it was in the power of a conductor to stop at different stations from those established for the line, or alter the running arrangements of the road to accommodate a particular passenger, he might thereby greatly incommode the public generally for the sake of a single passenger. The duty of a conductor is to run the trains according to public arrangements, and he has no power to change them; and a passenger has no right to infer that a conductor has any such power from his general duties as a conductor, and no reason to suppose that he can bind the railroad company by any such agreement.⁶

Sec. 1118. Carrier must give sufficient time to alight.—

When the conveyance has reached the destination of the passenger, the carrier must exercise the highest degree of practicable care, diligence, and skill in affording the passenger suffi-

17, 1878; *Dietrich v. The Railroad*, 71 Penn. St. 432; *Cheney v. The Railroad*, 11 Met. 121; *Boston, etc. R. R. v. Proctor*, 1 Allen, 267; *Johnson v. The Railroad Corporation*, 46 N. H. 213; *Cleveland, etc. R. R. v. Bartram*, 11 Ohio St. 457. (In this last case the conductor promised to slow up the train at a certain point for a passenger, and when that point was reached the train was slowed up somewhat. The passenger supposing that it was thereby intended that he should alight, jumped from the train and was injured. The court held that he had no right to rely on the promise of the conductor.)

6. *Ohio, etc. R. R. v. Hatton*, *supra*; *Ohio, etc. R'y v. Applewhite*, 52 Ind. 540; *Schiffler v. Railway Co.*, 96 Wis. 141, 71 N. W. Rep. 97, 65 Am. St. Rep. 35.

cient time and opportunity to alight,⁷ and if the usual sufficient time be not given him to alight, and he is compelled to go on to the next station,⁸ or if a sudden start of the conveyance be made whilst he is in the act of alighting, and an injury is occasioned to him thereby, it will be negligence in the carrier for the consequences of which he will be responsible.⁹ Evi-

7. *Keller v. Railroad Co.*, 27 Minn. 178; *Raben v. Railway Co.*, 73 Iowa, 579; *Mississippi, etc. R. Co. v. Gill*, 66 Miss. 39; *Hunt v. Railway Co.*, 94 Mo. 255; *Kelly v. Railroad Co.*, 70 Mo. 604; *Strauss v. Railroad Co.*, 75 Mo. 185; *Bar-ringer v. Railway Co.*, — Ark. —, 85 S. W. Rep. 94; *Railroad Co. v. Hughes*, 55 Kan. 491, 40 Pac. Rep. 919; *Railroad Co. v. Taylor*, 25 Ind. App. 679, 58 N. E. Rep. 852; *Railroad Co. v. Eakin's Adm'r*, 103 Ky. 465, 45 S. W. Rep. 529, 46 S. W. Rep. 496, 47 S. W. Rep. 872; *Railroad Co. v. Rick-etts*, 18 Ky. L. R. 687, 37 S. W. Rep. 952; *Railway Co. v. Richard-son*, 14 Ky. L. Rep. 367; *Kennon v. Railroad Co.*, 51 La. Ann. 1599, 26 So. Rep. 466; *McDonald v. Railroad Co.*, 87 Me. 466, 32 Atl. Rep. 1010; *Smalley v. Railroad Co.*, 131 Mich. 560, 91 N. W. Rep. 1027; *Gress v. Railway Co.*, — Mo. App. —, 84 S. W. Rep. 122; *Railway Co. v. Hubbard*, (Tex. Civ. App.) 76 S. W. Rep. 764; *Railway Co. v. Armes*, 32 Tex. Civ. App. 32, 74 S. W. Rep. 77; *Rail-way Co. v. Lee*, 21 Tex. Civ. App. 175, 51 S. W. Rep. 351, 57 S. W. Rep. 573; *Railway Co. v. McEl-ree*, 16 Tex. Civ. App. 182, 41 S. W. Rep. 843; *Railway Co. v. Frier*, (Tex. Civ. App.) 22 S. W. Rep. 6; *Railway Co. v. Russell*, 8 Tex. Civ. App. 578, 28 S. W. Rep. 1042; *Railway Co. v. Kennedy*, 12 Tex.

Civ. App. 654, 35 S. W. Rep. 335; *Railway Co. v. Dotson*, 15 Tex. Civ. App. 73, 38 S. W. Rep. 642; *Railway Co. v. Reeves*, 116 Ga. 743, 42 S. E. Rep. 1015; *Walters v. Railway Co.*, 113 Wis. 367, 89 N. W. Rep. 140; *Harvey v. Rail-way Co.*, 116 Ill. App. 507; *Missouri, etc. R'y Co. v. Wolf*, — Tex. Civ. App. —, 89 S. W. Rep. 778.

8. If a passenger is not given time to alight and is carried on to next station he is entitled to compensation. *Mississippi, etc. R. Co. v. Gill*, 66 Miss. 39.

9. A carrier, whether by steam or street railway, is liable where he negligently starts before pas-senger has had time to alight and while he is in the act of alight-ing. *Fairmount, etc. R'y v. Stut-ler*, 54 Penn. St. 375; *Pennsylva-nia R. R. v. Kilgore*, 32 *id.* 292; *Jeffersonville, etc. R. R. v. Par-malee*, 51 Ind. 42; *Hazard v. The Railroad*, 1 Biss. 503; *Fuller v. The Railroad*, 21 Conn. 557; *Jef-fersonville, etc. R. R. v. Hen-dricks*, 26 Ind. 228; *Mulhado v. The Railroad*, 30 N. Y. 370; *Nich-ols v. The Railroad*, 38 *id.* 131; *Cholette v. Railroad Co.*, 26 Neb. 159; *Ferry v. Railway Co.*, 118 N. Y. 497; *Breen v. Railroad Co.*, 109 N. Y. 297; *Baker v. Railway Co.*, 118 N. Y. 533; *McDonald v. Railroad Co.*, 116 N. Y. 546; *Wil-burn v. Railway Co.*, 36 Mo. App.

dence that the conveyance was moved by some one of the servants of the carrier is sufficient, and it is not necessary for the passenger to go further and prove from whose hand the injury came—whether a brakeman's, a conductor's, or an en-

- 203; *Jones v. Railway Co.*, 31 Mo. App. 614; *Straus v. Railroad Co.*, 75 Mo. 185; *Gulf, etc. Railroad Co. v. Williams*, 70 Tex. 159; *Pennsylvania R. Co. v. Lyons*, 129 Penn. St. 114; *West End R'y Co. v. Mozely*, 79 Ga. 463; *Chicago R'y Co. v. Mills*, 105 Ill. 63; *City R'y Co. v. Findley*, 76 Ga. 311; *Ridenhour v. Railway Co.*, 102 Mo. 270, 13 S. W. Rep. 889; *Owens v. Railroad Co.*, 95 Mo. 169, 8 S. W. Rep. 350; *Pennsylvania R. Co. v. Peters*, 116 Penn. St. 206; *Wood v. Railway Co.*, 49 Mich. 371; *Nance v. R. Co.*, 94 N. C. 619; *Augusta, etc. R. Co. v. Randall*, 79 Ga. 304, 11 S. E. Rep. 706; *Birmingham R'y Co. v. Hale*, 90 Ala. 8, 8 S. Rep. 142; *North Birmingham, etc. R. Co. v. Calderwood*, 89 Ala. 247; *Texas, etc. R'y Co. v. Miller*, 79 Tex. 78, 15 S. W. Rep. 264; *St. Louis, etc. R'y Co. v. Finley*, 79 Tex. 85, 15 S. W. Rep. 266; *Vredenburgh v. Railroad Co.*, 12 N. Y. Suppl. 18; *Medler v. Railroad Co.*, *id.* 930; *Finn v. Railway Co.*, 86 Mich. 74, 48 N. W. Rep. 696; *Railroad Co. v. Nunn*, 98 Fed. 963, 39 C. C. A. 364; *Nicholson v. Railway Co.*, 114 Fed. 89, 52 C. C. A. 37; *McSloop v. Railroad Co.*, 59 Fed. 431; *Kefauver v. Railroad Co.*, 122 Fed. 966; *Railroad Co. v. Harmon*, 147 U. S. 571; *Rutledge v. Railroad Co.*, 129 Fed. 94, 63 C. C. A. 596; *Railroad Co. v. Clausen*, 173 Ill. 100, 50 N. E. Rep. 680, *affirming* 70 Ill. App. 550; *Railroad Co. v. Revallee*, 17 Ind. App. 657, 46 N. E. Rep. 352; *Railway Co. v. Smith*, 5 Ind. App. 560, 32 N. E. Rep. 809; *Railway Co. v. Pavey*, 48 Kan. 452, 29 Pac. Rep. 593; *Railroad Co. v. Stewart*, 55 Kan. 667, 41 Pac. Rep. 961; *Railroad Co. v. Constantine*, 14 Ky. L. Rep. 432; *Railroad Co. v. Bayse*, 17 Ky. L. R. 105, 30 S. W. Rep. 600; *Railroad Co. v. Harmon*, 23 Ky. L. R. 871, 64 S. W. Rep. 640; *Railroad Co. v. Taylor*, 24 Ky. L. R. 1169, 70 S. W. Rep. 825; *Carruth v. Railway Co.*, 45 La. Ann. 1228, 14 So. Rep. 736; *Odom v. Railroad Co.*, 45 La. Ann. 1201, 14 So. Rep. 734, 23 L. R. A. 152; *Comerford v. Railroad Co.*, 63 N. E. Rep. 936, 181 Mass. 528; *Small-ey v. Railway Co.*, 131 Mich. 560, 91 N. W. Rep. 1027; *Olson v. Railway Co.*, — Minn. —, 102 N. W. Rep. 449; *Hooks v. Railway Co.*, 73 Miss. 145, 18 So. Rep. 925; *Railroad Co. v. Dear*, — Miss. —, 39 So. Rep. 812; *Moorman v. Railway Co.*, 105 Mo. App. 711, 78 S. W. Rep. 1089; *Young v. Rail- way Co.*, — Mo. App. —, 88 S. W. Rep. 767; *Emery v. Rail- road Co.*, 67 N. H. 434, 36 Atl. Rep. 367; *Zimmerman v. Railroad Co.*, 43 N. Y. Supp. 883, 14 App. Div. 562; *Murphy v. Railroad Co.*, 56 Hun, 645, 10 N. Y. Supp. 354; *Onderdonk v. Railway Co.*, 74 Hun, 42, 26 N. Y. Supp. 310; *Daly v. Railroad Co.*, 49 N. Y. Supp. 901, 26 App. Div. 200; *Smitson v. Railway Co.*, 37 Ore. 74, 60 Pac. Rep. 907; *Raughley v. Railroad*

gineer's. All that the passenger need show is that responsibility rested on one of a group of the carrier's servants; and rulings exonerating each member of the group successively would be wrong, either on the ground that evidence against

Co., 202 Pa. St. 43, 51 Atl. Rep. 597; *Howland v. Railroad Co.*, 26 R. I. 138, 58 Atl. Rep. 683; *Appleby v. Railroad Co.*, 60 S. Car. 48, 38 S. E. Rep. 237; *Railway Co. v. Goldman*, (Tex. Civ. App.) 51 S. W. Rep. 275; *Railway Co. v. Byers*, 5 Tex. Ct. R. 688, 69 S. W. Rep. 1009; *Railway Co. v. Bryant*, (Tex. Civ. App.) 26 S. W. Rep. 167; *Railway Co. v. Harrison*, 32 Tex. Civ. App. 368, 73 S. W. Rep. 38; *Carroll v. Burleigh*, 15 Wash. 208, 46 Pac. Rep. 232; *Gilmore v. Railway Co.*, 29 Wash. 150, 69 Pac. Rep. 743; *Alford v. Railway Co.*, 86 Wis. 235, 56 N. W. Rep. 743; *Hopkins v. Railway Co.*, — Wis. —, 107 N. W. Rep. 330.

In *Railroad Co. v. Wallace*, 202 Ill. 129, 66 N. E. Rep. 1096, *affirming* 104 Ill. App. 55, an original count in the declaration was as follows: "While the plaintiff, with all due care and diligence, was in the act of alighting therefrom (from the train), the defendant carelessly and negligently caused the said train to be suddenly and violently started, etc." After the lapse of three years and after the statute of limitations had run, plaintiff amended by adding after the word "therefrom" the clause "and before she had been allowed a reasonable time to alight." The court held that the amended count did not state a new cause of action, for "if appellant carelessly and negligently caused the

train to be suddenly started while the plaintiff was alighting therefrom, as averred in the original declaration, then the defendant did not allow her a reasonable time to alight from the train as averred in the additional counts."

In *Railroad Co. v. Storment*, 190 Ill. 42, 60 N. E. Rep. 104, *affirming* 90 Ill. App. 505, the following instruction was held to be without error: "Although you may believe from the evidence that the plaintiff jumped or stepped from the train in question after it was in motion, whereby she received the injuries complained of, yet if you further believe from the evidence, that while the plaintiff was descending the steps of said train, the same was suddenly, carelessly, and without warning to her set in motion by the defendant, and that the plaintiff was thereby placed in a perilous position, then it is for you to determine from the evidence whether the plaintiff acted as a reasonably prudent person would have done under like circumstances; and if you believe, from the evidence that under the surrounding circumstances the plaintiff was not guilty of negligence, but acted as a reasonably prudent person would have done under like circumstances, then the fact of her so stepping or jumping from said train while the same was in motion will not prevent the plaintiff from recovering in this case."

the group was some evidence against each member of it or else upon the ground that they were irrelevant to the evidence offered.¹⁰ But on the other hand, the carrier may contend and introduce evidence which tends to show that the passenger received his injuries from negligently stepping off the conveyance while the same was in motion instead of from a sudden start by it, and in such case the carrier would be entitled to an instruction which would correctly state the law if that view of the facts were correct.¹¹

Ordinarily the question whether a reasonable time has been afforded the passenger to alight is one for the jury. "The exact length of time to be given," it is said in one case, "must depend very largely upon circumstances. For instance, a longer time would be required when there are many passengers to alight than when there are but few; in a dark night, with the landing-place badly lighted, than when there is full light; at a difficult place to alight, than where it is easy. And as railroad companies usually carry not merely the vigorous and active, but also those who, from age or extreme youth, are slower in their movements than vigorous and active persons, the time of stopping is not to be measured by the time in which the latter may make their exit from the cars, but by the time in which the other class may, using diligence, but without hurry and confusion, alight. Those in charge of the trains are bound to presume that there may be such persons in the cars, and, unless they know there are not, they have no right to start the trains until they have waited long enough to allow such passengers to alight; nor, even after waiting a reasonable time for such persons to get off, have they a right to start the trains without using reasonable care to ascertain if there are such persons in the act of getting off. It certainly would not be permissible for them to be so reckless of the lives and limbs of passengers as to start the trains when

10. *Pomeroy v. Railroad Co.*, 172 64 N. Y. Supp. 350, 31 Misc. 471, Mass. 92, 51 N. E. Rep. 523. reversing 60 N. Y. Supp. 990.

11. *Cunningham v. Railroad Co.*,

they know, or with reasonable care might know, that passengers are in the act of alighting.”¹²

Where, however, this reasonable time has been given, those in charge of the train are “not required,” it is said, “to do what in many cases would be impossible to ascertain—‘to know’ that all passengers intending to stop at that station have alighted in safety.”¹³

Sec. 1119. (§ 613.) Same subject—Not liable where reasonable time and opportunity given, but passenger has delayed.—But if the passenger has been afforded ample time and

12. *Keller v. Railroad Co.*, 27 Minn. 178; *Barringer v. Railway Co.*, — Ark. —, 85 S. W. Rep. 94; *Railway Co. v. Slanker*, 77 Ill. App. 567; *affirmed*, 180 Ill. 357, 54 N. E. Rep. 309; *Pierce v. Gray*, 63 Ill. App. 158; *Railroad Co. v. Byrum*, 48 Ill. App. 41, *affirmed* 153 Ill. 131, 38 N. E. Rep. 578; *Railroad Co. v. Blye*, 43 Ill. App. 612; *Railway Co. v. Castello*, 9 Ind. App. 462, 36 N. E. Rep. 299; *Chicago, etc. R’y Co. v. Wimmer*, — Kan. —, 84 Pac. Rep. 378; *Hewes v. Railroad Co.*, 76 Md. 154, 24 Atl. Rep. 325; *Smalley v. Railway Co.*, 131 Mich. 560, 91 N. W. Rep. 1027; *Cullar v. Railway Co.*, 84 Mo. App. 340; *Becker v. Lincoln Real Estate & Bldg Co.*, 174 Mo. 246, 73 S. W. Rep. 581; *Mahar v. Railroad Co.*, 39 N. Y. Supp. 63, 5 App. Div. 22; *Smitson v. Railway Co.*, 37 Ore. 74, 60 Pac. Rep. 907; *Railway Co. v. Mitchell*, 98 Tenn. 27, 40 S. W. Rep. 72, citing *Hutch. on Carr.*; *St. Louis, etc. R. Co v. Ross*, — Tex. Civ. App. —, 89 S. W. Rep. 1105; *Walters v. Railroad Co.*, 113 Wis. 367, 89 N. W. Rep. 140.

For cases in which passengers were incumbered by bundles, see

Railway Co. v. Smith, 5 Ind. App. 560, 32 N. E. Rep. 809; *Killian v. Railroad & B. Co.*, 97 Ga. 727, 25 S. E. Rep. 384; *Flanagan v. Railroad Co.*, 55 Hun, 611, 8 N. Y. Supp. 744; *Railway Co. v. Born*, 20 Tex. Civ. App. 351, 50 S. W. Rep. 613.

13. *Raben v. Railway Co.*, 73 Iowa, 579, citing *Imhoff v. Railway Co.*, 20 Wis. 344; *Illinois, etc. R’y Co. v. Slatton*, 54 Ill. 133; *Clotworthy v. Railway Co.*, 80 Mo. 220; *Fairmount, etc. R’y Co. v. Stutler*, 54 Penn. St. 375. See also, *Railroad Co. v. Burt*, 92 Ala. 291, 9 So. Rep. 410, 13 L. R. A. 95; *Railway Co. v. Smith*, 90 Ala. 60, 8 So. Rep. 86, 24 Am. St. Rep. 761; *Railroad Co. v. Landauer*, 36 Neb. 642, 54 N. W. Rep. 976; *Shealey v. Railway Co.*, 67 S. Car. 61, 45 S. E. Rep. 119.

But the managers of the train should use due diligence to ascertain whether there are persons in the act of leaving it before they give the signal to start; and this is true although they may not know that a particular passenger intends to alight. *O’Dea v. Railroad Co.*, — Mich. —, 105 N. W. Rep. 746.

notice to leave the conveyance at his destination, and has failed to take advantage of the opportunity to alight, it has been held that his unreasonable delay may put an end to the relation of passenger, and that he may thus forfeit his right to that extraordinary care which the carrier owes to one in that character;¹⁴ and that, if afterwards he be injured in alighting, he can claim compensation from the carrier only for such negligence as would make him liable to one not a passenger.¹⁵

In a leading case¹⁶ upon the subject it is said: "All the duty the law imposes upon a conductor acting as the agent of

14. *Imhoff v. The Railway*, 20 Wis. 344; *Railway Co. v. Mitchell*, (Tex. Civ. App.) 26 S. W. Rep. 154; *Railway Co. v. McKenzie*, 30 Tex. Civ. App. 293, 70 S. W. Rep. 237; *Railway Co. v. Mathes*, 7 Tex. Ct. Rep. 172, 73 S. W. Rep. 411; *Railroad Co. v. Frazer*, 55 Kan. 582, 40 Pac. Rep. 923; *Dunning v. Railroad Co.*, — Ind. App. —. 77 N. E. Rep. 1049.

It is the duty of the passenger to leave the car with reasonable promptness. *Philadelphia, etc. R. Co. v. Hand*, — Md. —. 61 Atl. Rep. 285.

In the absence of a custom to give signals for passengers to get off, a railroad company is not bound to give any signal for such purpose after having stopped its train and kept it standing at the station a sufficient time to allow passengers to alight by the exercise of ordinary and reasonable diligence on their part. *Railroad Co. v. Dickinson*, 89 Ga. 455, 15 S. E. Rep. 534.

If the carrier holds the train sufficiently long to enable passengers to alight from it in safety, and the passenger does not use such speed in doing so as he

should, still if he attempts to alight from the train in the presence of those in charge of it and with that knowledge they give the signal while he is in the act of alighting, and the train starts, throwing him from it and injuring him, the carrier will be liable. *Railroad Co. v. Harmon*, 23 Ky. L. R. 871, 64 S. W. Rep. 640.

A plaintiff is not conclusively barred by an estimate, ignorantly and inadvisedly made, of the time consumed by her in alighting, where the facts, related in detail, show due diligence by her in alighting, for a jury might conclude that she was wide of the mark in making her estimate. *Culberson v. Railway Co.*, 50 Mo. App. 556.

15. *Imhoff v. The Railroad*, 22 Wis. 682; *Railroad Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. Rep. 698; *Railway Co. v. Turner*, (Tex. Civ. App.) 77 S. W. Rep. 255, citing *Hutch. on Carr.*; *Fanning v. Railway Co.*, (Tex. Civ. App.) 86 S. W. Rep. 354.

But see *Gaynor v. The Railway*, 100 Mass. 208. See also, *Clotworthy v. Railroad Co.*, 80 Mo. 220.

16 *Hurt v. Railway Co.*, 94 Mo.

a corporation, in order to comply with the obligation of the carrier to a passenger, is to carry him safely to his point of destination, announce the arrival of the train at the station, and give him a reasonable opportunity to leave the cars. When this is done the duty of the conductor ceases. And when the servants of a corporation engaged in the business of a common carrier afford passengers a reasonable time to leave the cars after arrival at the end of their journey, they have the right, at the expiration of such reasonable period, to presume that all passengers, whose place of destination is then reached, have done what is customary for passengers in like circumstances to do, to wit, have left the cars.

“When such a reasonable time has thus elapsed, it is no part of the duty of the servants of such corporation to make personal inspection of, or to interrogate, the remaining passengers, to see whether they intend leaving the cars. The law imposes no such onerous duty upon a carrier of passengers. And if it should appear in evidence in any given case that passengers similarly situated as to age, sex, etc., have safely left the cars prior to any injury or accident complained of, this would afford ground for legitimate inference by the jury that sufficient time had been granted to the passenger who sues for a negligent injury to have alighted in safety.”

Sec. 1120. Same subject—Not liable where passenger has evaded payment of fare.—So while it is the duty of a conductor to see that all passengers on his train have a reasonable opportunity to alight at their respective destinations, he is relieved from such duty where a passenger has evaded payment of fare and the conductor consequently has no notice of such passenger's destination. It cannot be said under such circumstances that the conductor is negligent if the passenger is in-

255, distinguishing and explaining *Kelly v. Railroad Co.*, 70 Mo. 604.

A person who gets on a train to assist another on, and whose presence is not known to the officers

of the train, has no right to notice to get off before the train starts, there being no custom to give such a notice. *Coleman v. Railroad Co.*, 84 Ga. 1.

jured in attempting to leave the train, after it has started, with no notice to the conductor.¹⁷

Sec. 1121. (§ 614.) Must give notice of arrival at stations.—

It has also been held that railway carriers of passengers must, besides sufficient time and opportunity to alight, give due notice of the arrival of their trains at their various stations. "In the case of goods," said the court, "the obligation is to carry and deliver; as to passengers, it is simply to carry, and to allow them sufficient time and opportunity to leave the vehicle

. . . Yet, as passengers must necessarily often travel in such conveyances as railroads to places whose localities are entirely unknown to them, a duty devolves upon the carrier, in order to afford them an opportunity to depart at their points of destination, to give notice of the arrival of the trains at such places. The mode of performing this duty by railroads appears to be well established by general custom throughout the country to be to announce in a distinct and audible manner in each car, so that it may be heard by all passengers, the arrival of the trains at each station or fixed place of departure, and then to stop a sufficient length of time to allow the passengers to get off without danger or injury to their persons. And this proceeds upon the reasonable ground that they are vigilant to do their part of the undertaking which they set out to accomplish, and which is only to be done by their own exertion."¹⁸

But railway carriers of passengers are under no duty to give

17. *Railroad Co. v. Smith*, 110 Tenn. 197, 75 S. W. Rep. 711, 100 Am. St. Rep. 799.

Co. v. Cohn, 22 Tex. Civ. App. 11, 53 S. W. Rep. 698; *Railroad Co. v. Goodyear*, 28 Tex. Civ. App. 206, 66 S. W. Rep. 862.

18. *Railroad Co. v. Hobbs*, 118 Ga. 227, 45 S. E. Rep. 23, 63 L. R. A. 68; *Southern R. R. Co. v. Kendrick*, 40 Miss. 374. See also, *Raben v. Railway Co.*, 73 Iowa, 579; *Hurt v. Railway Co.*, 94 Mo. 255; *Keller v. Railroad Co.*, 27 Minn. 178; *Louisville, etc. R. Co. v. Mask*, 64 Miss. 738; *Railroad*

Care should be taken by the carrier to make announcements intelligible to the different classes of people usually to be found on public conveyances and to guard against possible misunderstandings. *Laub v. Railway Co.*, (Tex. Civ. App.), 94 S. W. Rep. 550.

passengers personal notice that their particular station has been reached, and a promise by a conductor to notify a passenger personally of his arrival at his station is a mere personal undertaking as between the conductor and passenger and beyond the scope of the conductor's duty.¹⁹ Exceptional circumstances, however, may impose this duty, as where considerations of age, sex, or physical infirmity may bring that within the scope of the conductor's duty toward a passenger although otherwise it would be beyond the limit of such obligation. But it must appear that the conductor knew such exceptional facts in order to bind the company.²⁰

So a railway conductor is not bound to personally enter a car upon its arrival at a station to inform passengers for that station that they have reached their destination. It is sufficient if the name of the station is duly announced by an employe of the railway company whom it may select to perform such duty.²¹ And even though the station is not announced, if it appears that a passenger was asleep and that it is as reasonable to suppose that he was carried beyond his station by his own negligence in such regard as by the carrier's negligence, he cannot recover. Such failure to announce ought not to count against the company relatively to a passenger who cannot show by any satisfactory proof that he was misled thereby.²²

19. *Railway Co. v. Boyles*, 11 Tex. Civ. App. 522, 33 S. W. Rep. 247; *Railroad Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. Rep. 698; *Railway Co. v. McCullough*, (Tex. Civ. App.) 33 S. W. Rep. 285; *Railway Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. Rep. 324.

20. *Railway Co. v. Boyles*, *supra*.

Where a female passenger is deaf, and the name of the station is announced by the porter, it being a station short of her destination, and she alights supposing

that her destination has been reached, the carrier is not liable for failure to carry her to destination where the servants in charge of the train had no notice of her infirmity. *Railroad Co. v. Terry*, 27 Tex. Civ. App. 341, 65 S. W. Rep. 697, citing *Hutch. on Carr.*

21. *Railway Co. v. O'Bryan*, 115 Ga. 659, 42 S. E. Rep. 42; *s. c.* 112 Ga. 127, 37 S. E. Rep. 161.

22. The failure to announce the name of a certain station affords no cause of action against the company where it appears that

Sec. 1122. (§ 615.) Must be careful not to invite the passenger to alight at an improper time or place.—As has already been shown, railway carriers of passengers must provide safe platforms and other necessary facilities for access to and for alighting and egress from their trains by their passengers,²³ and their duty in this regard has been indicated, as far as it can be done, from the adjudicated cases. Having provided such platforms, they are required to be careful to bring their coaches up to them in such manner that their passengers may be afforded the opportunity safely to alight upon them; and if the passenger be called upon to leave the coach before this has been done, or if he is reasonably induced to believe, from the circumstances or from the conduct of those in management of the train, that it has been halted in order that the passenger may there alight, and that no other or better opportunity will be given him to do so, and in undertaking to leave the conveyance, with due care and discretion, he receives an injury from the want of the proper facilities for doing so, or by reason of the dangerous character of the ground, the carrier will be held responsible for its negligence.²⁴ A number of such in-

the passenger destined to that station was, on the arrival of the train, soundly asleep. The negligence of the company must appear, with at least some degree of certainty, to have been the proximate cause of the passenger being carried beyond his station. *Seaboard, etc. R'y Co. v. Rainey*, 122 Ga. 307, 50 S. E. Rep. 88, 106 Am. St. Rep. 134.

23. *Ante*, § 928 *et seq.*

24. *Louisville, etc. R'y Co. v. Lucas*, 119 Ind. 583; *Richmond R'y Co. v. Scott*, 86 Va. 902, 11 S. E. Rep. 404; *Ward v. Railway Co.*, 165 Ill. 462, 46 N. E. Rep. 365, *reversing* 61 Ill. App. 530, citing *Hutch. on Carr.*; *Railway Co. v. Holsapple*, 12 Ind. App. 301, 38 N. E. Rep. 1107; *Railway Co.*

v. Pavey, 48 Kan. 452, 29 Pac. Rep. 593; *Railway Co. v. Friel*, 19 Ky. L. Rep. 152, 39 S. W. Rep. 704; *Railroad Co. v. State*, 81 Md. 371, 32 Atl. Rep. 201; *Larson v. Railroad Co.*, 85 Minn. 387, 88 N. W. Rep. 994; *Smitson v. Railroad Co.*, 37 Ore. 74, 60 Pac. Rep. 907, citing *Hutch. on Carr.*; *Hartzig v. Railroad Co.*, 154 Pa. St. 364, 26 Atl. Rep. 310; *Railway Co. v. Elliott*, 26 Tex. Civ. App. 106, 61 S. W. Rep. 726; *Railway Co. v. McLane*, (Tex. Civ. App.) 32 S. W. Rep. 776; *Railway Co. v. Porter*, (Tex. Civ. App.) 41 S. W. Rep. 88; *Ellis v. Railway Co.*, 120 Wis. 645, 98 N. W. Rep. 942; *McDermott v. Railway Co.*, 82 Wis. 246, 52 N. W. Rep. 85.

A passenger on a railroad train

stances have been brought to the attention of the English courts in actions for damages occasioned to railway passengers in this manner, and the question as to the circumstances under which the companies should be chargeable with such negligence has received much discussion;²⁵ from which the conclusion to be drawn is that such companies must be extremely careful not to mislead their passengers into the belief that the halting of a train at a station is meant as an invitation to them to alight when it is not so intended; and that if the conduct of the servants engaged in its management is such as may reasonably produce that impression, and the passenger so understands it, and in the attempt to leave the coach at a place where no facilities are provided for his doing so, and whilst in the exercise of due diligence in doing so, he is injured, the company will be liable. *A fortiori* is the company liable where the passenger is required to alight in a dangerous place.²⁶

has the right to rely upon the information given by a conductor or brakeman upon the train that it has reached the station to which he is destined, and if, relying upon such information, he leaves the train at that place, and it proves not to be the station he was informed it was, the company is liable for all the proximate damages which may ensue therefrom. *Railroad Co. v. Jenkins*, 15 Ky. L. R. 239.

25. *Cockle v. The Railway*, L. R. 7 C. P. 321; *Whitaker v. The Railway*, L. R. 5 C. P. 464; *Foy v. The Railway*, 18 C. B. (N. S.) 225; *Lewis v. The Railway*, L. R. 9 Q. B. 66; *Weller v. The Railway*, L. R. 9 C. P. 126; *Gee v. The Railway*, L. R. 8 Q. B. 161; *Bridges v. The Railway*, L. R. 6 Q. B. 377, L. R. 7 H. L. App. 213; *Siner v. The Railway*, L. R. 4 Exch. 117;

Prager v. The Railway, L. R. 5 C. P. 466; *Robson v. The Railway*, L. R. 10 Q. B. 271.

26. *Griffith v. Missouri Pac. R'y Co.*, 98 Mo. 168; *Philadelphia, etc. R. Co. v. McCormick*, 124 Penn. St. 427; *Railroad Co. v. Smith*, 13 Ky. L. R. 974 (passenger injured while crossing plank, by direction of conductor, from car to platform); *Bethmann v. Railroad Co.*, 155 Mass. 352, 29 N. E. Rep. 587 (Train stopped in such a way that passengers had to step on truck to alight, and a passenger was injured).

Whether or not it is negligence for the carrier to fail to provide a stool for passengers to get on or off its trains is a question of fact for the jury in the decision of which, a prior custom of the carrier to provide such stools may be an important factor. *Railway Co.*

Railway carriers of passengers, however, are not liable for unforeseen accidents due to mistaken impressions of passengers. Thus a railroad company has been held not liable where, as required by statute, the train stopped before crossing another track, and a passenger, supposing that the train had arrived at the station, stepped off the car which was standing on a bridge and was drowned, nothing having been done or said by the trainmen to give passengers such an impression.²⁷

Sec. 1123. (§ 616.) Same subject—Effect of calling name of station.—But the mere calling out of the name of the station has not been considered as sufficient, under all circumstances, to justify the passenger in coming to such a conclusion, especially in the day-time, or at a station with the landing place of which he is familiar; and the question of negligence in every instance of the kind is one of fact for the jury.²⁸ Certainly the mere calling out the name of the station does not of itself entitle the passenger to alight, if there are other circumstances from which he must reasonably infer that the carriage is not at the platform.²⁹ But where, after the calling of the name of

v. Sherrill, 32 Tex. Civ. App. 116, 72 S. W. Rep. 429; *Railway Co. v. Bell*, 25 Ky. L. R. 10, 74 S. W. Rep 700; *Madden v. Railway Co.*, 35 S. Car. 381, 14 S. E. Rep. 713, 28 Am. St. Rep. 855.

The alighting place at the rear end of the car, in the absence of notice to the passengers to the contrary, must be as safe as the forward end for it is well known that it is a general custom of passengers to use both ends. *McDonald v. Railroad Co.*, 88 Iowa, 345, 55 N. W. Rep. 102.

27. *Davis v. Railroad Co.*, 64 Hun, 492, 19 N. Y. Supp. 516.

28. *Hooks v. Railway Co.*, 73 Miss. 145, 18 So. Rep. 925, citing *Hutch. on Carr.*

The question of negligence must

go to the jury on all the circumstances of the case, and an instruction asked by the carrier giving undue prominence to the mere calling of the name of the station and stopping of the train and ignoring other circumstances showing negligence is properly refused. *Barry v. Railway Co.*, 172 Mass. 109, 51 N. E. Rep. 518.

The announcement by the porter, "Jersey City, last stop, all out," followed by the opening of the vestibule door of the car, does not amount to an invitation to alight. It is merely an announcement that the train has reached, or is about to reach the end of the journey. *Mearns v. Railroad Co.*, — C. C. A. —, 139 Fed. 543.

29. *Central R. Co. v. Van Horn*,

the station, the train soon thereafter comes to a full stop, the passenger may reasonably conclude that the train has stopped at the station, and may endeavor to alight, unless the circum-

38 N. J. L. 133; *Railroad Co. v. Holmes*, 97 Ala. 332, 12 So. Rep. 286; *Railroad Co. v. Means*, 48 Ill. App. 396; *Railroad Co. v. Depp*, 17 Ky. L. R. 1049, 33 S. W. Rep. 417; *Fletcher v. Railroad Co.*, 187 Mass. 463, 73 N. E. Rep. 552,* 105 Am. St. Rep. 414; *Victor v. Railroad Co.*, 164 Pa. St. 195, 30 Atl. Rep. 381; *Townsend v. Railway Co.*, 106 Tenn. 162, 61 S. W. Rep. 56; *Payne v. Railway Co.*, 106 Tenn. 167, 61 S. W. Rep. 86; *Railroad Co. v. Anderson*, 72 Md. 519, 20 Atl. Rep. 2; *England v. Railroad Co.*, 153 Mass. 490, 27 N. E. Rep. 1.

In *Mitchell v. Railway Co.*, 51 Mich. 236, the plaintiff, a woman, was a passenger on defendant's train, and was to change cars to take another road at Lansing. The latter road was crossed by defendant's road at a distance from the depot of each, and the two depots were quite far apart. On account of the distance, the conductor of defendant's road offered to carry her to the junction. The statute of the state required all railroad trains before crossing another line to be brought to a full stop at not less than two hundred or more than eight hundred feet from the crossing. Just before arriving at the junction, and when the train was some three hundred or four hundred feet from it, the name of the junction station was called out by the proper person, and the cars came to a full stop as required by law before reaching crossings. Plaintiff at once left her seat and hurried to leave the car, no officer of the train noticing her. She went down the steps, where there was no platform or other convenience for landing, and, just as she stepped off, the cars started to go on to the depot and she fell and broke her ankle. When the train reached the station, the conductor came to help her off, and, not finding her, ran his train back until she was discovered. The accident happened early in the morning, during daylight. In an action for damages it was held that she was not entitled to recover. "The only cause of the mischief," said the court, per Campbell, J., "leaving defendant's carelessness or negligence out of view, was her mistaken supposition that the cars had stopped for the station, and that she should therefore get out. There was nothing at the spot to indicate a landing place, and there was, at the proper place, a short distance further on, a building and platform appropriate and used for that purpose. The stoppage of the cars was required by statute, as well as by usage, as a precaution against collisions. The calling of the station was not shown to have been out of the usual course, and from the distance mentioned we can hardly conceive it should have been delayed. No one representing the company, whether conductor or brakeman, is shown to have known or suspected that plaintiff had put herself in peril or left her place. Nothing is shown which put them in fault for not knowing this. We

stances are such as to make it manifest that the proper and usual stopping place has not been reached.³⁰

Sec. 1124. Same subject—Where announcement is made by stranger.—The passenger, on hearing the name of his station

cannot discover anything in the record to indicate that there was any act or any omission not incident to the constant usage of the road, or indicating fault. The starting of the train after such a stoppage is an incident plainly contemplated by law. The company . . . cannot be expected to treat its passengers as children, or to put them under restraint. Passengers must take the responsibility of informing themselves concerning the every-day incidents of railway traveling, and the company could not do business on any other basis."

In *Smith v. Railway Co.*, 88 Ala. 538, Clopton, J., says: "Calling out the name of the station is customary and proper, so that passengers may be informed that the train is approaching the station of their destination and prepare to get off when it arrives at the platform. The mere announcement of the name of the station is not an invitation to alight; but, when followed by a full stoppage of the train soon thereafter, is, ordinarily, notification that it has arrived at the usual place of landing passengers. Whether the stoppage of the train, after such announcement, and before it arrives at the platform, is negligence, depends upon the attendant circumstances. The rule is aptly expressed in *Bridges v. Railway Co.*, L. R. 6 Q. B. 377, by Willes, J.: 'It is an announcement by the railway offi-

cers that the train is approaching or has arrived at the platform, and that the passengers may get out when the train stops at the platform, or under circumstances induced and caused by the company in which the man may reasonably suppose he is getting out at the place where the company intended him to alight. To that extent, calling out is an invitation.'"

30. *Columbus, etc. R'y Co. v. Farrell*, 31 Ind. 408; *International, etc. R. Co. v. Eckford*, 71 Tex. 274; *Philadelphia, etc. R. Co. v. McCormick*, 124 Penn. St. 427; *Philadelphia, etc. R. Co. v. Edelstein* (Penn.), 16 Atl. Rep. 847; *Memphis, etc. R'y Co. v. Stringfellow*, 44 Ark. 322; *Terre Haute, etc. R. Co. v. Buck*, 96 Ind. 346; *International, etc. R. Co. v. Smith*, (Tex. Sup.) 14 S. W. Rep. 642; *Richmond, etc. R. Co. v. Smith*, 92 Ala. 237, 9 S. Rep. 223; *Smith v. Railway Co.*, 88 Ala. 538, 7 So. Rep. 119, 16 Am. St. Rep. 63, 7 L. R. A. 323; *Davis v. Railway Co.*, — Ark. —, 86 S. W. Rep. 995; *Railway Co. v. Sain*, (Tex. Civ. App.) 24 S. W. Rep. 958; *Railway Co. v. Dotson*, 15 Tex. Civ. App. 73, 38 S. W. Rep. 642; *Railway Co. v. Johnson*, 59 Ark. 122, 26 S. W. Rep. 593; *Railroad Co. v. Worthington*, 30 Ind. App. 633, 65 N. E. Rep. 557, 66 N. E. Rep. 478, 96 Am. St. Rep. 355; *Englehaupt v. Railroad Co.*, 209 Pa. 182, 58 Atl. Rep. 154.

In Kentucky, a statute requires

announced, cannot ordinarily be presumed to know that it is not made by the authority of the carrier. If, therefore, the name of the station is announced by a stranger, such announcement, if made in the presence or hearing of a servant of the

the name of the station to be announced within a reasonable time before it is reached, and it has been held that, if, for any reason after the announcement has been made, the train is compelled to stop before arriving at the station, it is the duty of the carrier to warn the passengers to that effect so they may act accordingly. *Coe v. Railroad Co.*, 25 Ky. L. R. 1679, 78 S. W. Rep. 439.

In *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. Rep. 631, the defendant McNulta was receiver of a railroad upon which Ensich was a passenger. He and a number of others were passengers bound for a small station known as Starne's, at which the train upon which he was riding was not scheduled to stop and to which no tickets were sold for that train. He and the other passengers, however, paid fare to that point and were not told that the train would not stop there. About five hundred feet beyond Starne's was a railway crossing, and trains were required by law to stop within eight hundred feet of it before crossing. In complying with this provision, trains sometimes stopped at the platform at Starne's, sometimes beyond it, and sometimes before reaching it. Just before reaching Starne's station on this occasion, the name of the station was called in the usual manner, the train stopped at the platform, and plaintiff started to get off.

Just as he was in the act of alighting, however, the train suddenly started and ran fifty or sixty yards further, where it stopped long enough for passengers to alight. Plaintiff was quite seriously injured, and it was held that he was entitled to recover. "The stop at the platform," said the court, "as to the plaintiff, under the peculiar facts of this case, might be properly regarded by him as the stoppage of the train at the point where it was intended to let off the passengers. Having, by the acts and conduct of his servants, justified the plaintiff in attempting to get off the train, the duty of the defendant then attached to stop his train a sufficient length of time to enable the plaintiff to reach the platform in safety. His duty to the plaintiff, whom he had induced to believe that the train had reached the point at which he was to depart therefrom, was in respect of the place where the train first halted, and not in respect of the place where it finally stopped."

In *Wood v. Railway Co.*, 49 Mich. 370, a passenger desired to stop at a small station. Just before it was reached, the name was called in the usual manner. As the train slackened up, the passenger went out on the platform and asked the conductor if the train would stop there for water and was told that it would; the passenger then stepped on the lower step while

carrier, imposes upon the carrier the duty to give a counter warning that passengers are not yet to leave the train; and it may be found to be negligence on the part of the carrier to permit a passenger, without warning him, to go upon the platform for the purpose of leaving the train under such circumstances. The testimony of the carrier's servant, that he did not hear any one make an announcement, is competent in such a case as bearing on the question whether it was his duty to warn passengers, who appeared to be about to leave the train, that it had not stopped for the purpose of allowing them to alight.¹

Sec. 1125. Same subject—Effect of notice to passengers to take other cars.—A notice to passengers, bound for certain places, to take other cars on the train does not call upon the passengers to leave the train, especially if the notice is given while the train is in motion. If a passenger thereafter, for his own convenience, and it being too dark to see where he is going, steps from the car to walk back to the other cars and falls through a bridge, he is guilty of such contributory negligence as will bar a recovery from the railroad company.²

the train was still in motion, and when it came to a full stop, attempted to step off onto the platform at the usual and customary place for passengers to get off. As he was in the act of alighting, the train started up with a jerk, moved on a few feet to the tank, and then stopped. No signal was given that it would so start. The passenger was injured and was held to be entitled to recover.

Evidence of other passengers on the same train but on different cars that the train had stopped before it reached the station, that the name of the station was called, and that people then went towards the car door, is admissible as part of the occurrence. *Merrill v. Rail-*

road Co., 139 Mass. 252, 29 N. E. Rep. 666.

In Michigan, the court seems to differentiate between the word "station" and the word "stop," holding that where the carrier announces the name of the next "station," the passenger has no right to get off at the next "stop" without further inquiry on his part in order to inform himself whether he has arrived at destination. *Minock v. Railway Co.*, 97 Mich. 425, 56 N. W. Rep. 780.

1. *Floytrup v. Railroad Co.*, 163 Mass. 152, 39 N. E. Rep. 797; *Railway Co. v. Farr*, 70 Ark 264, 68 S. W. Rep. 243. (Here the call was made by a porter.)

2. *Kellogg v. Smith*, 179 Mass. 595, 61 N. E. Rep. 138.

Sec. 1126. (§ 617.) Same subject—Carrying passengers past platforms or stations.—Carriers must be equally careful not to pass beyond the alighting platform or station, and thus to require or make it necessary for the passenger to alight without returning to it. When this has been done, it is a breach of the carrier's contract, and the passenger may demand a return to the station or platform before leaving the train, and if the servant of the company in charge, without sufficient excuse, refuse to return with him, but leaves him to get back by other means, the passenger will be entitled to an action, and to the recovery of such damages as proximately result from the tortious refusal of the carrier to return.³ But

3. Passenger may recover damages for the discomfort, inconvenience, sickness, expenses, costs and charges which are shown by the proof to have been the direct and proximate, natural and probable result of the carrier's breach of duty. *International, etc. R'y Co. v. Terry*, 62 Tex. 380; *Railway Co. v. Richardson*, 14 Ky. L. R. 367; *Book v. Railway Co.*, 85 Mo. App. 76; *s. c.* 75 Mo. App. 604; *Cable v. Railway Co.*, 122 N. Car. 892, 29 S. E. Rep. 377; *Fordyce v. Dillingham*, (Tex. Civ. App.) 23 S. W. Rep. 550; *Hutchison v. Railway Co.*, — N. Car. —. 52 S. E. Rep. 263.

Is entitled to compensation for trouble and inconvenience in getting back. *East Tenn. etc. R. Co. v. Lockhart*, 79 Ala. 315; *Illinois, etc. R. Co. v. Able*, 59 Ill. 131; *Illinois, etc. R. Co. v. Chambers*, 71 Ill. 519; *Mobile, etc. R. Co. v. McArthur*, 43 Miss. 180.

May have exemplary damages under aggravated circumstances. *New Orleans, etc. R. R. v. Hurst*, 36 Miss. 660; *Southern R. R. Co. v. Kendrick*, 40 *id.* 374; *Memphis,*

etc. R. R. v. Whitfield, 44 *id.* 466; *Georgia, etc. R. R. v. McCurdy*, 45 Ga. 288; *Chattanooga, etc. R. R. v. Liddell*, 85 Ga. 482, 11 S. E. Rep. 853; *Alabama, etc. R. Co. v. Sellers*, 93 Ala. 9, 9 S. Rep. 375; *Strange v. Railway Co.*, 61 Mo. App. 586; *Samuels v. Railroad Co.*, 35 S. Car. 493, 14 S. E. Rep. 943, 28 Am. St. Rep. 883.

The carrier will not be excused from returning to the station because it is inconvenient or troublesome. *Samuels v. Railroad Co.*, *supra*.

But if a passenger "jumps or leaves the train under circumstances which render the act imprudent, he does so at his own risk and assumes the consequences of the act." *Owens v. Railway Co.*, 84 Mo. App. 143.

In *Railway Co. v. Price*, 106 Ga. 176, 32 S. E. Rep. 77, 43 L. R. A. 402, 71 Am. St. Rep. 246, plaintiff was negligently carried beyond her station. The conductor at the station to which she was carried arranged with an hotel proprietor for her to stay over night at the hotel, he agreeing to pay the ex-

it has been held that if, in such a case, there should be no demand to be taken back, or refusal to do so, and no attending circumstances of aggravation, and the passenger voluntarily leaves the car, all that the passenger could rightfully claim would be compensation for the inconvenience to which he had been put.⁴ And if, under an apprehension that the train will not come to a stop or return to the station, the passenger undertake to leave it while in motion, and is injured, he will be chargeable with contributory negligence, and the company will not be responsible.⁵

Where the passenger is carried past his station, and, by agreement with the carrier's servant, alights at a point beyond, the carrier is bound to exercise the same care for his safety as if the stop were being made at the station, and if the train starts suddenly while the passenger is alighting, the carrier will be liable for any injuries to the passenger resulting therefrom.⁶ And where the passenger is required either expressly or impliedly to leave the car without assistance and to find his way unaided back to the station, during which time he receives injury, the carrier is liable. This is held to be true even

penses, and further with the passenger that in the morning he would carry her back to her destination when his train returned. During the night a kerosene lamp which was in her room exploded and, setting fire to the contents of the room, caused her injury. In an action against the carrier it was held that it was not within the scope of the conductor's employment to constitute the hotel proprietor the agent of the carrier for the purpose of taking care of the plaintiff during the night, and that the carrier was not liable.

So the railroad's servants cannot be presumed to know that a passenger who was asleep and carried past his station, if put off at

a place a mile or so distant, will be beaten and robbed by foot pads on his way back to the station. *Atkinson v. Railway Co.*, 90 Mo. App. 489.

4. *Southern Railroad Co. v. Kendrick*, 40 Miss. 374; *Gulf, etc. R'y Co. v. Head*, (Tex. Civ. App.) 15 S. W. Rep. 504; *Railroad Co. v. Keith*, 22 Ky. L. R. 593, 58 S. W. Rep. 468.

In *Railroad Co. v. Worman*, 12 Ind. App. 494, 40 N. E. Rep. 751, the evidence in the case was examined and held to show that the passenger did not voluntarily leave the car.

5. See *post*, § 1177, *et seq.*

6. *Railway Co. v. Topping*, 25 Ky. L. R. 1390, 78 S. W. Rep. 135.

though the passenger is carried upon a freight train.⁷ Much less does the carrier discharge his duty where he puts the passenger off away from the depot at night in a strange place, and requires him thence to return to the place at which he should have been discharged.⁸

It is not necessary that actual force be used in expelling the passenger. For the purpose of this rule, he is required to get off when the alternative is presented of getting off there or being carried to the next station.⁹ All this implies, however,

7. Where a freight train is accustomed to discharge its passengers at some place other than the platform, or where it is impracticable for it to reach the platform with the caboose or car in which passengers are carried, the passenger may be required to leave the train at some other appropriate and convenient place not connected with the platform; but in such cases the passengers are entitled to receive such care and attention as are necessary to enable them to safely reach the station.

The duty of a railroad company, as a common carrier of passengers, is not performed until it delivers its passenger in proper condition at the station to which he has paid his fare; and where a passenger on a railroad train is carried past his point of destination, it is the duty of those in charge of the train to either back the same to the station, or to notify the passenger how and where to alight, warn him of any dangers incident to alighting at that point, and give him such assistance or instructions as may be necessary to assure his safe return to the station; and if, without the fault of the passenger, he is injured in

making his way back to the station, the company is liable therefor. *New York, etc. R'y Co. v. Doane*, 115 Ind. 435. To same effect, *Adams v. Railway Co.*, 100 Mo. 555.

For cases where passenger trains were stopped away from the platform, and passengers were injured by tripping on rails, the railroad company being held liable, see *Hancock v. Railroad Co.*, 91 N. Y. Supp. 601, 100 App. Div. 161; *Mensing v. Railroad Co.*, 117 Mich. 606, 76 N. W. Rep. 98.

In New York, railways are under a statutory obligation to furnish adequate facilities for alighting, and if a passenger is carried past his station, and is injured by the railway's failure to perform the duty expressly imposed by statute, such failure is of itself negligence. *Minor v. Railway Co.*, 47 N. Y. Supp. 307, 21 App. Div. 307.

8. *Galveston, etc. R'y Co. v. Crispi*, 73 Tex. 236; *Winkler v. Railway Co.*, 21 Mo. App. 99; *Burnham v. Railway Co.*, 91 Mich. 523, 52 N. W. 14; *Kral v. Railway Co.*, 71 Minn. 422, 74 N. W. Rep. 166; *Case v. Railroad Co.*, 191 Pa. St. 450, 43 Atl. Rep. 319.

9. *Galveston, etc. R'y Co. v.*

that the passenger had been carried past his station without his fault; for where the train stopped a sufficient length of time for passengers to alight in safety, but the passenger was asleep and was afterwards let off at his own request, it was held that the company, not otherwise in fault, was not liable for an injury sustained by him in getting back to the station.¹⁰ And here, as in other cases, as will be seen hereafter, it is the duty of the passenger not to run unnecessary risks or aggravate his injury, but to use ordinary care to avert injury and to prevent his damages from being greater than the situation necessitates,¹¹ and he cannot recover for an injury sustained by him in getting to the station caused by his failure to use ordinary care.¹²

As the carrier, in making reasonable rules and regulations for the conduct of its business, has the right to designate the stations where it will discharge passengers only upon notice, it is the duty of the holder of a ticket to a flag station where the trains stop only on notice to the conductor to inform the conductor of his destination; and if such passenger fails to notify the conductor or some other employe of the carrier of his

Crispi, 73 Tex. 236; Alabama, etc. R. Co. v. Sellers, 93 Ala. 9, 9 S. Rep. 375; Georgia, etc. R. Co. v. Eskew, 86 Ga. 641, 12 S. E. Rep. 1061; Railway Co. v. Humphries, 108 Ga. 591, 34 S. E. Rep. 283, citing Hutch. on Carr.

10. Wilson v. Railroad Co., 68 Miss. 9, 8 So. Rep. 330; Fisher v. Paxon, 182 Pa. St. 457, 38 Atl. Rep. 407; Bascom v. Railroad Co., 102 Mo. App. 430, 76 S. W. Rep. 697.

If a passenger negligently fails to alight at his station, a sufficient opportunity being given, and thereafter desires to get off between that and the next station, the company is not liable for an injury incurred in the act of get-

ting off if it used ordinary care. Louisville, etc. R. Co. v. Stokes, 12 Ky. L. R. 192.

11. Gulf, etc. Ry. Co. v. Head, (Tex. Civ. App.) 15 S. W. Rep. 504; Railway Co. v. Cole, 66 Tex. 562; Georgia, etc. R. Co. v. Eskew, 86 Ga. 641, 12 S. E. Rep. 1061, distinguishing Spicer v. Railroad Co., 149 Mass. 207.

12. International, etc. R. Co. v. Folliard, 66 Tex. 603. In this case the passenger was put off at one end of a trestle and his gun at the other. He crossed the trestle to get his gun, got his feet muddy, and in going back over the trestle his muddy feet caused him to slip and receive injury. Held, that for this the company was not liable.

destination, and should consequently be carried beyond it before giving such notice, the carrier will have violated no duty to the passenger.¹³

Sec. 1127. (§ 617a.) Helping passengers to alight.—Where the carrier has provided safe and suitable conveniences at a proper place for the alighting of passengers and has brought his vehicle to a stop at that place and given passengers reasonable time in which to alight, it is ordinarily no part of his duty to assist them, though females, in so doing.¹⁴

But this duty may be imposed where the passenger is known to be so sick, aged or infirm as to need assistance in alighting safely.¹⁵ And certainly where the passenger is called upon to alight away from the station or at a dangerous and unusual place where conveniences for that purpose have not been provided, the carrier owes to the passenger the duty to see that he has such assistance as is reasonably necessary to enable him to

13. *Pence v. Railroad Co.*, 23 Ky. L. R. 1207, 64 S. W. Rep. 905.

14. *Raben v. Railway Co.*, 73 Iowa, 579; s. c. 74 Iowa, 732; *Railroad Co. v. Hobbs*, 118 Ga. 227, 45 S. E. Rep. 23, 63 L. R. A. 68; *Railway Co. v. Reeves*, 116 Ga. 743, 42 S. E. Rep. 1015; *Deming v. Railway Co.*, 80 Mo. App. 152; *Hanks v. Railroad Co.*, 60 Mo. App. 274; *Young v. Railway Co.*, 93 Mo. App. 267.

A promise by the conductor to assist a passenger who is not known to him to be sick, infirm, or in need of assistance, is a mere voluntary promise for which the carrier is not responsible and by which it is not bound. *Railroad Co. v. Earnwood*, 104 Ga. 127, 29 S. E. Rep. 913.

Where the employees of a railroad company have no notice that a passenger intends to alight at a

station other than his destination, and situated in an uninhabited place for the accommodation of the railroad employees only, the latter owe no duty to the passenger to assist him in alighting. *Nichols v. Railroad Co.*, 90 Mich. 203, 51 N. W. Rep. 364.

The law does not require a carrier to furnish portable steps, in the absence of a controlling usage to the contrary, for the use of its passengers in entering or leaving the car. *Young v. Railway Co.*, 93 Mo. App. 267.

15. *Ante*, § 992. *Railroad Co. v. Hobbs*, 118 Ga. 227, 45 S. E. Rep. 23, 63 L. R. A. 68, citing *Hutch. on Carr.*; *Madden v. Railway Co.*, 41 S. Car. 440, 19 S. E. Rep. 951; *Werner v. Railway Co.*, 105 Wis. 300, 81 N. W. Rep. 416; *McDermott v. Railway Co.*, 82 Wis. 246, 52 N. W. Rep. 85.

alight in safety.¹⁶ As is said in one case,¹⁷ "the contract of a railroad company with a passenger does not terminate until he has alighted from the cars."

Whether the circumstances are such in a given case as to suggest the necessity of assisting a passenger to alight is a question for the jury.¹⁸

Sec. 1128. (§ 617b.) Awaking sleeping passengers.—So it is ordinarily no part of the carrier's duty to see that passengers are awake when the train reaches their destinations, and the company is not bound by the conductor's promise to so awaken a passenger.¹⁹ Exceptional circumstances might, however, impose the duty.

But in the case of sleeping-cars, the rule is different. There the passenger is invited to go to sleep and pays extra for the conveniences therefor, and, as will be seen, it is the duty of the

16. *Texas, etc. R'y Co. v. Miller*, 79 Tex. 84, 15 S. W. Rep. 264, 23 Am. St. Rep. 308; *St. Louis, etc. R'y Co. v. Finley*, 79 Tex. 85, 15 S. W. Rep. 266; *Railroad Co. v. Hendricks*, 26 Ind. 232, 41 Ind. 69; *Railroad Co. v. Wortham*, 73 Tex. 27; *Memphis, etc. R. Co. v. Whitfield*, 44 Miss. 466; *Alexandria, etc. R. Co. v. Herndon*, 87 Va. 193, 12 S. E. Rep. 289; *Railroad Co. v. Taylor*, 25 Ind. App. 679, 58 N. E. 852; *Railway Co. v. Bell*, 25 Ky. L. R. 10, 74 S. W. Rep. 700; *Bailey v. Richardson*, 14 Ky. L. R. 367; *Kral v. Railway*, 71 Minn. 422, 74 N. W. Rep. 166; *Doolittle v. Railroad Co.*, 62 S. Car. 130, 40 S. E. Rep. 133; *Railway Co. v. Buchanan*, 31 Tex. Civ. App. 209, 72 S. W. Rep. 96; *Ellis v. Railway Co.*, 120 Wis. 645, 98 N. W. Rep. 942.

17. *St. Louis, etc. R'y Co. v. Finley*, *supra*.

18. *Railway Co. v. Reeves*, 116 Ga. 743, 42 S. E. Rep. 1015.

19. *Sevier v. Railroad Co.*, 61 Miss. 8; *Nunn v. Railroad Co.*, 71 Ga. 710; *Nichols v. Railway Co.*, 90 Mich. 203, 51 N. W. Rep. 364; *Atkinson v. Railway Co.*, 90 Mo. App. 489; *Railroad Co. v. Cohn*, 22 Tex. Civ. App. 11, 53 S. W. Rep. 698; *Railway Co. v. Alexander*, (Tex. Civ. App.) 30 S. W. Rep. 1113; *Railway Co. v. Kendrick*, (Tex. Civ. App.) 32 S. W. Rep. 42; *Seaboard, etc. R'y Co. v. Rainey*, 122 Ga. 307, 50 S. E. Rep. 88, 106 Am. St. Rep. 134.

Where by reason of the passenger falling asleep, he is carried beyond his destination, it is no part of the carrier's duty to carry him to the next station; and if he refuse to pay his fare to such station, he may be removed from the train. *Railway Co. v. James*, 82 Tex. 306, 18 S. W. Rep. 589, 15 L. R. A. 347.

company's servants to awaken him in time to dress and alight in safety.²⁰

Sec. 1129. (§ 617c.) Furnishing passengers necessary instructions.—So it is the duty of the carrier, especially the carrier by railroad in these days when great union depots with their multiplicity of trains going in all directions, their noise and bustle and confusion are apt to bewilder even the experienced traveler; when women, children and inexperienced persons are frequently upon their trains, and where the safety and dispatch of the journey require that the passenger should take or leave the train at particular times or places, to give to the passenger such directions and information as are reasonably necessary to enable him to pursue his journey without unnecessary danger or delay.²¹

But, as has been seen,²² it is expected that passengers will exercise ordinary intelligence and prudence in the conduct of their journey, and the carrier will not be liable, in the absence of special circumstances, where he has used such means and given such information as would be sufficient for the requirements of a traveler of ordinary intelligence exercising reasonable care and caution.²³ Yet where the carrier knowingly accepts as a passenger a person whose age, sex or condition is such as to require unusual diligence in directing or guarding against injury, the precaution adequate to the need of travelers generally will not suffice.²⁴

20. *Post*, § 1142.

21. *Dwinelle v. Railroad Co.*, 120 N. Y. 117; *Newcomb v. Railroad*, 182 Mo. 687, 81 S. W. Rep. 1069. (Must provide reasonable arrangements for directing passengers at depot.) See also, *St. Louis, etc. R. Co. v. White*, — Tex. —, 89 S. W. Rep. 746; *Trapp v. Railway Co.*, — S. Car. —, 51 S. E. Rep. 919.

If an employe of the carrier negligently gives the passenger

the wrong name of a station so that he is induced to alight before his destination is reached, the carrier will be liable in damages. *Railway Co. v. Cook*, 12 Ind. App. 109, 38 N. E. Rep. 1104.

22. *Ante*, § 1067.

23. *Barker v. Railroad Co.*, 24 N. Y. 599.

24. See *ante*, § 992, *et seq.*; *Hemmingway v. Railroad Co.*, 72 Wis. 42.

II. SLEEPING AND PARLOR CARS.

Sec. 1130. (§ 617d.) Sleeping-car companies not common carriers or innkeepers, but bound for reasonable care.—Notwithstanding strenuous efforts to hold them liable in that capacity, it is well settled that sleeping-car companies are not common carriers of the goods of passengers nor are they liable as innkeepers.²⁵

25. *Lewis v. Sleeping-Car Co.*, 143 Mass. 267; *Woodruff Sleeping-Car Co. v. Diehl*, 84 Ind. 474; *Pullman Car Co. v. Gardner*, 3 Penny. 78; *Pullman Car Co. v. Gaylord* (Super. Ct. of Ky.), 23 Am. L. Reg. (N. S.) 788; s. c. 26 Am. L. Reg. (N. S.) 512; *Pullman Car Co. v. Pollock*, 69 Tex. 120; *Blum v. Palace Car Co.*, 1 Flippin, 500; *Dargan v. Pullman Car Co.*, 2 Wilson, 607; *Pullman Car Co. v. Smith*, 73 Ill. 360; *Welch v. Pullman Car Co.*, 16 Abb. Pr. (N. S.) 352; *Palmeter v. Wagner*, 11 Alb. L. Jour. 149; *Pfaetzer v. Car Co.*, 4 Weekly Notes, 240; *Scaling v. Pullman Car Co.*, 24 Mo. App. 29; *Carpenter v. Railroad Co.*, 124 N. Y. 53; *Hughes v. Palace Car Co.*, 74 Fed. 499; *Pullman Palace Car Co. v. Adams*, 120 Ala. 581, 24 So. Rep. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53; *Smith v. Pullman's Palace Car Co.*, 5 Rev. de Jur. (Canada) 423; *Pullman Palace Car Co. v. Hall*, 106 Ga. 765, 32 S. E. Rep. 923, 71 Am. St. Rep. 293, 44 L. R. A. 790; *Dawley v. Wagner Palace Car Co.*, 169 Mass. 315, 47 N. E. Rep. 1024; *Adams v. Steamboat Co.*, 151 N. Y. 163, 45 N. E. Rep. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616, *affirming* 29 N. Y. Supp. 56, 9 Misc.

25; *Williams v. Webb*, 58 N. Y. Supp. 300, 27 Misc. 508, *modifying* 49 N. Y. Supp. 1111, 22 Misc. 513.

A sleeping-car company which, by contract with a railroad company, runs its cars in connection with the trains of the road, the latter company furnishing the road and the motive power and making the contracts with the passengers for their transportation, is liable neither as a common carrier nor as an innkeeper for the baggage or personal effects of the passenger to whom it furnishes accommodation and which he brings with him into its car. The contract for the transportation of the passenger being with the railway company, and the compensation for the carriage being paid to it, the passenger cannot be regarded as the passenger of the sleeping-car company, nor can it be held liable as a common carrier for the carriage of his baggage, for which it receives no compensation. It is not a carrier at all, but merely furnishes accommodations to the passengers of another company. Nor can it be regarded as an innkeeper, who is defined to be "the keeper of a common inn for the lodging and entertainment of travelers and pas-

“A sleeping-car company,” says Morton, C. J., “holds itself out to the world as furnishing safe and comfortable cars, and, when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for, and make use of, its cars for sleeping, all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any such steps to protect himself in a sleeping-car, but, by the necessity of the case, is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise.

“The law raises the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier or as an innholder, yet it is its duty to use reasonable care to guard the passenger from theft, and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it. Such a rule is required by public policy, and by the true interests of both the passenger and the company, and the decided weight of authority supports it.”

Sec. 1131. (§ 617e.) Same subject—Negligence the test of liability.—The test of the liability, therefore, is negligence, the failure to use that degree of care which the circumstances of the case reasonably demand, and if there is no negligence, or if the negligence of the passenger contributed to cause the loss,

sengers, their horses and attendants, for a reasonable compensation as a public business, and who is bound to take in all travelers and wayfaring persons, and to entertain them, and who, in consequence of his public employment, is held to the most rigid responsibility for the goods of his guest.” This extraordinary liability of the innkeeper, standing less upon reason than upon custom, growing out

of a state of society no longer existing, should not be extended, it has been said, to the proprietors of a sleeping-car, for the following reasons:

1. The peculiar construction of sleeping-cars is such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sec-

tions. All the berths open upon a common aisle, and are secured only by a curtain, behind which a hand may be slipped from an adjoining or lower berth, with scarcely a possibility of detection.

2. As a compensation for his extraordinary liability, the innkeeper has a lien upon the goods of his guests for the price of their entertainment. I know of no instance where the proprietor of a sleeping-car has ever asserted such lien, and it is presumed that none such exists. The fact that he is paid in advance does not weaken the argument, as innkeepers are also entitled to prepayment.

3. The innkeeper is obliged to receive every guest who applies for entertainment. The sleeping-car receives only first-class passengers traveling upon that particular road, and it has not yet been decided that it is bound to receive those.

4. The innkeeper is bound to furnish food as well as lodging, and to receive and care for the goods of his guests, and, unless otherwise provided by statute, his liability is unrestricted in amount. The sleeping-car furnishes a bed only, and that, too, for a single night. It furnishes no food, and receives no luggage, in the ordinary sense of the term. The conveniences of the toilet are simply an incident to the lodging.

5. The conveniences of a public inn are an imperative necessity to the traveler, who must otherwise depend upon private hospitality for his accommodation, notoriously an uncertain reliance. The traveler by rail, however, is under no obligation to take a sleeping-car.

The railway offers him an ordinary coach, and cares for his goods and effects in a van especially provided for that purpose.

6. The innkeeper may exclude from his house every one but his own servants and guests. The sleeping-car is obliged to admit the employees of the train to collect fares and control its movements.

7. The sleeping-car cannot even protect its guests, for the conductor of the train has a right to put them off for non-payment of fare or violation of its rules and regulations. Per Brown, J., in *Blum v. The Southern Palace Car Co.*, reported in *Cen. L. Jour.* vol. III, p. 591, and 22 *Int. Rev. Rec.* 305. But see *The Railroad Company v. Lillie*, cited *post*, § 1266, where the railroad company was held liable as an insurer of the safety of such baggage as was not easily susceptible of exclusive custody by the passenger which he had taken with him into the sleeping-car.

The case of *Pullman Car Co. v. Lowe*, 28 Neb. 239, 44 N. W. Rep. 226, holds the company liable as innkeeper, but this case is clearly opposed to the great weight of authority, and its force is lessened by the fact that the court treated the question as a new one, which it obviously was not. The report of this case, however, in 6 *Law. Rep. Ann.* 809, shows that the counsel for the company in his brief cited a large number of cases to the court to the contrary of its conclusion, no one of which is referred to by the court in its opinion.

By the constitution of Mississippi, sleeping-car companies are common carriers. *Pullman Palace*

there can be no recovery.¹ The mere fact, therefore, that baggage is lost from a sleeping-car does not raise any presumption of negligence, and to sustain a recovery against the sleeping-car company some evidence of negligence on the part of the defendant must be given.² But, on the other hand, the invitation to make use of a berth carries with it, as has been stated, an invitation to sleep, and an implied agreement to take reasonable care of the passenger's effects while he is asleep, and a failure to use ordinary care proportionate to the danger reasonably to be apprehended would be such negligence as would ordinarily make the company liable for the loss of the passenger's property.³ And the burden is on the company

Car Co. v. Laurence, 74 Miss. 782, 22 So. Rep. 53.

1. *Whitney v. Pullman Car Co.*, 143 Mass. 243; *Pullman Palace Car Co. v. Freudenstein*, 3 Colo. App. 540, 34 Pac. Rep. 578; *Williams v. Webb*, 58 N. Y. Supp. 300, 27 Misc. Rep. 508, *modifying* 49 N. Y. Supp. 1111, 22 Misc. Rep. 513; *Arthur v. Pullman Co.*, 88 N. Y. Supp. 981, 44 Misc. 229.

2. *Pullman Car Co. v. Arents*, 28 Tex. Civ. App. 71, 66 S. W. Rep. 329; *Pullman Co. v. Hatch*, 30 Tex. Civ. App. 303, 70 S. W. Rep. 771, citing *Carpenter v. Railway Co.*, 124 N. Y. 53, 26 N. E. Rep. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644.

3. See cases cited in preceding section. See, also, *Florida v. Car Co.*, 37 Mo. App. 598; *Pullman Car Co. v. Matthews*, 74 Tex. 654; *Cooney v. Pullman Palace Car Co.*, 121 Ala. 368, 25 So. Rep. 712, 53 L. R. A. 690; *Pullman's Palace Car Co. v. Adams*, 120 Ala. 581, 24 So. Rep. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53; *Kates v. Pullman Palace Car Co.*, 95 Ga. 810, 23 So. Rep. 186; *Pullman Palace*

Car Co. v. Martin, 92 Ga. 161, 18 S. E. Rep. 364; *Pullman's Palace Car Co. v. Hunter*, 107 Ky. 519, 47 L. R. A. 286, 54 S. W. Rep. 845; *Hampton v. Pullman Palace Car Co.*, 42 Mo. App. 134; *Morrow v. Pullman Palace Car Co.*, 98 Mo. App. 351, 73 S. W. Rep. 281; *Belden v. Pullman Palace Car Co.* (Tex. Civ. App.), 43 S. W. Rep. 22; *Stevenson v. Palace Car Co.* (Tex. Civ. App.), 26 S. W. Rep. 112, 32 S. W. Rep. 335; *Pullman Co. v. Hatch*, 30 Tex. Civ. App. 303, 70 S. W. Rep. 771.

While the same degree of care might not be required in the case of a passenger awake as in the case where the passenger is asleep, yet such care is required in each case as is reasonable under the circumstances. *Pullman Palace Car Co. v. Hall*, 106 Ga. 765, 32 S. E. Rep. 923, 44 L. R. A. 790, 71 Am. St. Rep. 293.

The fact that a passenger sleeps in the smoking compartment by permission of the porter in charge of the car, even though no charge is made for such accommodations, will not, in the absence of collu-

to show that it exercised reasonable care while the passenger was asleep in protecting his property from theft.⁴ The obligation of the company also includes the supplying of its car with sufficient servants of suitable capacity and experience, the so arranging their trips and ordering their duties that they may be able to exercise the care required, and, having done this, the company is then bound to keep, by such servants, a reasonable and continuous watch over the car and its contents during the night.⁵ And where the passenger's effects are purloined by the company's servants themselves, there can be no doubt that the company is liable.⁶

sion by the passenger and porter to defraud the company, relieve the company from exercising the same watchfulness to protect his baggage and personal effects while he is asleep as though he paid for and occupied a regular berth. *Morrow v. Pullman Palace Car Co.*, 98 Mo. App. 351, 73 S. W. Rep. 281.

4. *Kates v. Pullman Palace Car Co.*, 95 Ga. 810, 23 S. E. Rep. 186; *Pullman's Palace Car Co. v. Hall*, 106 Ga. 765, 32 S. E. Rep. 923, 44 L. R. A. 790, 71 Am. St. Rep. 293.

5. In the *Carpenter* case (124 N. Y. 53) but one servant was kept on the car, and he was required to perform the duties of conductor and porter, and was also permitted to earn money for himself by blacking boots, in which service he was in a portion of the car from which the sleeping compartments could not be seen. This was held to show a *prima facie* case of negligence.

In the *Lewis* case (143 Mass. 267) the facts were quite similar. The porter's run was from Boston to Chicago. His duties were such that he could not keep the aisle continuously in view. After the

loss he was found asleep in the end of the car. The company was held liable.

In the *Scaling* case (24 Mo. App. 29) and the *Diehl* case (84 Ind. 474) the same was true. The duties of the porter were such that he could not perform them and keep a constant watch. The company was held liable in each case.

In the *Pollock* case (69 Tex. 120) the porter was a new man unfamiliar with his duties. A verdict for the plaintiff was not disturbed.

Where the passenger is injured through the negligence of the sleeping car in failing to keep its cars in suitable condition, either the sleeping car company or the railroad company can be held responsible. *Pullman Co. v. Norton*, — Tex. Civ. App. —, 91 S. W. Rep. 841.

6. *Pullman's Palace Car Co. v. Martin*, 95 Ga. 314, 22 S. E. Rep. 700, 29 L. R. A. 498; *Pullman Car Co. v. Gavin*, 93 Tenn. 53, 23 S. W. Rep. 70, 21 L. R. A. 298, 42 Am. St. Rep. 902; *Hatch v. Pullman Co.* (Tex. Civ. App.), 84 S. W. Rep. 246.

Sec. 1132. (§ 617f.) Same subject—Limit of the liability.—

But the sleeping-car company, under this rule, will be held liable only for such reasonable baggage as the passenger needs upon his journey; his clothing and personal ornaments and the small articles of luggage usually carried in the hand, and a reasonable sum of money for his traveling expenses.⁷ Nor will the company be liable for a loss occurring through the negligence of the passenger in leaving his property exposed, nor for a theft committed by a fellow-passenger if the servants of the company were not negligent in failing to prevent it.⁸ Nor

7. *Blum v. Car Co.*, 1 Flippin, 500; *Welch v. Pullman Car Co.*, 16 Abbott Pr. (N. S.) 352, 43 N. Y. Superior Ct. 457; *Palmeter v. Wagner*, 11 Alb. L. Jour. 149; *Pfaetzer v. Car Co.*, 4 Weekly Notes, 240; *Root v. Sleeping Car Co.*, 28 Mo. App. 199; *Pullman Car Co. v. Gaylor*, *supra*; *Woodruff Car Co. v. Diehl*, 84 Ind. 474; *Illinois Cent. R. Co. v. Handy*, 63 Miss. 609; *Hillis v. R'y Co.*, 72 Iowa, 228; *Wilson v. Railroad Co.*, 32 Mo. App. 682; *Barrett v. Palace Car Co.*, 51 Fed. 796; *Kates v. Pullman Palace Car Co.*, 95 Ga. 810, 23 S. E. Rep. 186; *Hampton v. Pullman Palace Car Co.*, 42 Mo. App. 134; *Williams v. Webb*, 58 N. Y. Supp. 300, 27 Misc. Rep. 508, *modifying* 49 N. Y. Supp. 1111, 22 Misc. Rep. 513; *Morrow v. Car Co.*, 98 Mo. App. 351, 73 S. W. Rep. 281.

No claim could be made for a pistol, but the company would be liable for a mileage book carried by a traveling man, opera glasses, glass and brass compass, razor and strop. *Cooney v. Palace Car Co.*, 121 Ala. 368, 25 So. Rep. 712, 53 L. R. A. 690.

8. *Whicher v. Railroad Co.*, 176 Mass. 275, 57 N. E. Rep. 601, 79

Am. St. Rep. 314; *Chamberlain v. Pullman Palace Car Co.*, 55 Mo. App. 474; *Morrow v. Pullman Palace Car Co.*, 98 Mo. App. 351, 73 S. W. Rep. 281.

Illinois Cent. R. Co. v. Handy, 63 Miss. 609. In this case it is held: 1. If a passenger, on leaving a sleeping-car at its destination, negligently leave his pocket-book containing money in the car, the sleeping-car company is not responsible for the property so left, if it be stolen by some one not in the employ of the company, unless an agent of the company discovered before the theft that such property had been left. 2. A sleeping-car company is not liable to a passenger for property stolen by a fellow-passenger, where the theft was not committed in the presence of a servant of the company, or under such circumstances as would reasonably suggest to such servant that the theft was being or about to be committed, if the servants of the company were not guilty of any negligence in keeping that reasonable guard which its contract implies that it will keep. 3. A sleeping-car company is not liable for

will the company be held liable for the loss of property while under the control of the passenger, in the absence of some fault or negligence on its part, and the mere fact of the loss is not sufficient evidence of such fault or negligence.⁹ Contracts limiting the liability of the sleeping-car company rest upon the same rules as in case of passenger carriers generally, which is elsewhere treated.¹⁰

Sec. 1133. Same subject—Liability while passenger is away from berth.—It is not only the duty of the sleeping-car company to maintain a reasonable watch while the passenger is

money stolen by one of its employees from a passenger on its car, except to the extent of a sum reasonably sufficient for the expenses of the journey which such passenger is undertaking.

So a parlor-car company is not liable for the loss of a small satchel left by the passenger in an exposed and conspicuous place near an open window, from which it was stolen while the passenger was absent from the car obtaining refreshments during the stopping of the train. *Whitney v. Pullman Car Co.*, 143 Mass. 243; *Levins v. Railroad Co.*, 183 Mass. 175, 66 N. E. Rep. 803, 97 Am. St. Rep. 434.

The law draws no distinction as to the places of safety in the berth for the deposit of the valuables of the passenger while asleep. *Pullman Palace Car Co. v. Adams*, 120 Ala. 581, 24 So. Rep. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53.

And in the case of a diamond ring, it is not negligence for the passenger to put the ring he is accustomed to wear in his pocket-book while asleep. *Pullman Palace Car Co. v. Adams*, *supra*.

9. *Tracy v. Car Co.*, 67 How. Pr. 154; *Welch v. Car Co.*, 16 Abb. Pr.

(N. S.) 352; *McMurray v. Pullman's Palace Car Co.*, 86 Ill. App. 619; *Efron v. Palace Car Co.*, 59 Mo. App. 641; *Whicher v. Railroad Co.*, 176 Mass. 275, 57 N. E. Rep. 601, 79 Am. St. Rep. 314.

As for money kept in the passenger's pocket by day and put under his pillow at night. *Carpenter v. Railroad Co.*, 124 N. Y. 53; *Sessions v. Railroad Co.*, 78 Hun, 541, 29 N. Y. Supp. 628.

Contrast the above cases with *Pullman Palace Car Co. v. Freudenstein*, 3 Colo. App. 540, 34 Pac. Rep. 578, in which a much more favorable rule to the traveler is laid down.

Where plaintiff gave his umbrella to the porter, who alone was in charge of the car, to take to his berth, and then went to bed, and the next morning he could not find the umbrella, no explanation being offered by the sleeping-car company, the negligence of the latter is sufficiently shown to sustain a verdict against it. *Irving v. Pullman Co.*, 84 N. Y. Supp. 248.

10. See *Lewis v. Sleeping-Car Co.*, 143 Mass. 267.

Ante, § 1069 *et seq.*

asleep, but its duty also extends to keeping a reasonable watch over the passenger's necessary baggage and belongings which he cannot conveniently take with him or watch himself while he is absent from his berth in the washing room or toilet place.¹¹

Sec. 1134. (§ 617g.) Same rules apply to parlor-car companies.—The rules applicable to a sleeping-car company apply also to a parlor-car company. It is not a common carrier of the passenger's effects, but is bound to use reasonable care and caution, and is liable for a loss arising from its negligence unless the passenger's negligence contributed to cause the loss.¹²

Sec. 1135. (§ 617h.) Railroad company liable as common carrier to passenger of sleeping-car.—But the fact that the sleeping-car company is not liable as a common carrier for the loss of the goods of the passenger does not relieve the railroad company from its liability as such to the passenger on its train while he is riding in the sleeping-car which the railroad company has permitted or procured to be run as a part of the train.¹³ Under such circumstances it is the railroad com-

11. *Morrow v. Pullman Palace Car Co.*, 98 Mo. App. 351, 73 S. W. 281.

It is a question of fact for the jury as to the negligence of a sleeping-car company when the porter opens a window in violation of a rule of the company, placing a valise of a passenger on a seat near the open window, and the valise is stolen while the passenger is away from his seat. *Dawley v. Wagner Palace Car Co.*, 169 Mass. 315, 47 N. E. Rep. 1024.

12. *Whitney v. Pullman Car Co.*, 143 Mass. 243; *Duval v. Pullman Palace Car Co.*, 62 Fed. 265, 10 C. C. A. 331, 23 U. S. App. 527, 33 L. R. A. 715; *petition for writ of certiorari denied*, 163 U. S. 684. (In this latter case it was held

that if the railroad company refuses on any account to convey the car beyond a certain point, and turns it back before it has reached its journey's end, those are not the acts of the parlor-car company, and they form no basis for a suit for damages against it.)

13 *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Railroad Co. v. Katzenberger*, 16 Lea, 380; *Cleveland R. Co. v. Walrath*, 38 Ohio St. 461; *Thorpe v. New York Cent. R. Co.*, 76 N. Y. 402; *Kinsley v. Lake Shore R. Co.*, 125 Mass. 54; *Jones v. Railway Co.*, 125 Mo. 666, 28 S. W. Rep. 883, 46 Am. St. Rep. 514, 26 L. R. A. 718; *Railroad Co. v. Ray*, 101 Tenn. 1, 46 S. W. Rep. 554; *Blake v. Railway Co.*

pany's duty to see that sleeping-cars which are run over its road are properly equipped, in good condition, and properly managed.¹⁴ Nor can the railroad company limit its common-law liability for negligence by any arrangement which it may make with the sleeping-car company, because, as between the passenger and the railroad company, the agents of the sleeping-car company are the agents of the railroad company.¹⁵ But the liability of the railroad company in this case is, like that of the sleeping-car company, limited to reasonable baggage and traveling expenses,¹⁶ although the former company will be liable for the torts of the latter company's servants.¹⁷

Sec. 1136. Railroad company entitled to determine who shall occupy sleeping-cars.—The cars of the sleeping-car company, being under the control of the railroad company except as to furnishing lodging to those who pay for it, the agents of the railroad company are entitled to determine who shall occupy the sleeping-cars, as part of the train. Thus an agent of the railroad company may, under its regulations, refuse to sell a berth ticket to one not holding a first class ticket.¹⁸

Sec. 1137. Sleeping-car company not responsible for train connections.—Since the railroad company is responsible for the running of trains, a statement in the official guide of a sleeping-car company that certain trains connect with others at specified times is not a warranty of punctuality, but a mere representation that the proper times of those trains are mentioned therein, and impose no duty on the company to see that such trains arrive on time.¹⁹

(Tex. Civ. App.), 85 S. W. Rep. 430.

14. *Robinson v. Railroad Co.*, 135 Mich. 254, 97 N. W. Rep. 689.

15. *Railroad Co. v. Katzenberger*,

16 *Lea*, 380; *Kinsley v. Lake Shore R. Co.*, 125 Mass. 54; *Pullman Co. v. Norton*, — Tex. Civ. App. —, 91 S. W. Rep. 841.

16. *Hillis v. Ry. Co.*, 72 Iowa. 228.

17. *Dwinelle v. Railroad Co.*, 120

N. Y. 117; *Bayley v. Railway Co.*, L. R. 7 C. P. 415. But see *Pad-dock v. R. R. Co.*, 37 Fed. Rep. 841.

18. *Lemon v. Pullman Palace Car Co.*, 52 Fed. 262; *Lawrence v. Pullman Car Co.*, 144 Mass. 1; *Pullman Palace Car Co. v. Lee*, 49 Ill. App. 75.

19. *Lockyer v. Sleeping Car Co.*, (1892) 61 L. J. Q. B. 501.

Sec. 1138. Responsibility of sleeping-car company where sleeping-car does not go over the same line of railroad that passenger's ticket calls for.—But if, after inspection of a passenger's railroad ticket, an agent of a sleeping-car sells the passenger a ticket for a berth on the sleeping-car, it is a representation to the passenger that the sleeping-car will go by the same line of railroad that the passenger's ticket calls for. Such representation is in the nature of a warranty, and the contract may therefore be treated as embodying it as a part of its terms. It is plain that this contract is broken if the passenger is compelled by the sleeping-car company, or by those for whose acts it is responsible, to leave the car at any time before reaching his destination because his railroad ticket calls for a different line than that over which the sleeping-car passes; and, in that event, he is entitled to recover for the breach of contract, as he could do if he had been wrongfully ejected by a common carrier of passengers or by an innkeeper. For such ejection the sleeping-car company is liable not only for the direct, but also for the consequential damages, which should have been anticipated as the natural and probable result of its breach of contract, subject to the limitation that the damages recovered could not be enhanced by the negligence or wilful conduct of the passenger.²⁰

Sec. 1139. (§ 617i.) Duty of sleeping-car company to furnish berth.—The sleeping-car company, having a vacant berth in its car, is bound to furnish it to any proper person who enters at the proper time and place, and tenders the fare fixed for the same;²¹ but the company is not liable for refusing to sell sleeping-car accommodations to a person not having a proper railroad ticket to entitle him to such accommodations.²² So,

^{20.} *Pullman's Palace Car Co. v. Car Co. v. Lee*, 49 Ill. App. 75; King, 99 Fed. 380, 39 C. C. A. 573. *Lemon v. Pullman Palace Car Co.*,

^{21.} *Nevin v. Pullman Car Co.*, 52 Fed. 262.

106 Ill. 222; *Searles v. Car Co.*, 45 Fed. Rep. 330.

^{22.} *Lawrence v. Pullman Car Co.*, 144 Mass. 1; *Pullman Palace* neglected to procure a ticket

it is said, the company has the right to sell to one passenger a whole section, and that no cause of action will arise against it because it refuses to sell the upper berth in that section to another passenger, though such upper berth is not in fact occupied.²³ Neither is the company liable for giving the preference in the sale of a berth to the one first applying for it.²⁴ In fact, when a passenger has made a demand for a berth and the company promises to furnish or reserve one for him, there is a valid contract, the mutual promises being a consideration. The fact that another person demands such berth before the passenger has presented himself to pay for it will not excuse its failure to comply with its undertaking, and if such passenger is excluded from the berth which the company has contracted to furnish him, the company will be liable for whatever inconvenience and mortification the passenger suffers in consequence of its wrongful act.²⁵

which he would have been entitled to without further payment, but who enters the train without any evidence of his right to occupy a berth. And if another passenger gives up his berth to the one so refused, the passenger so giving up his berth cannot demand other accommodations from the sleeping-car company without further full payment for the same. *Pullman Palace Car Co. v. Marsh*, 24 Ind. App. 129, 53 N. E. Rep. 782.

23. *Searles v. Car Co.*, 45 Fed. 330.

24. *Searles v. Car Co.*, *supra*.

25. *Pullman Palace Car Co. v. Booth* (Tex. Civ. App.), 28 S. W. Rep. 719.

After a passenger has paid for and been assigned a berth in a sleeping-car, to be offered his money back does not furnish sufficient redress for being told that the berth is occupied by some one else, and to be compelled to sit up

all night in an ordinary day coach to secure such rest as he might therein. The jury is entitled to allow the passenger a reasonable compensation for his discomfort. *Brawn v. Webb*, 65 N. Y. Supp. 668, 32 Misc. 243; *s. c.* 62 N. Y. Supp. 1037.

If by a standing order of the railroad company certain berths are reserved for passengers from a certain station, and the conductor erroneously sells one of the berths so reserved, the conductor may, within a reasonable time before reaching that station, notify the passenger of his error and offer the occupation of another berth in the car equal to the first berth in accommodation; and if the passenger refuses to accept the other berth, and leaves the car without being compelled to do so by the conductor, the passenger is not entitled to damages. *Mann Boudoir Car Co. v. Dupre*, 54 Fed.

But in all cases, the right of the passenger to a berth in a sleeping-car is subject to such reasonable rules and regulations as the company may prescribe for the safety and comfort of its passengers.²⁶

Sec. 1140. Duty of sleeping-car company to furnish means of getting into or out of berth.—It is not alone the undertaking of a sleeping-car company to provide the bed to sleep in, but also reasonably safe means of getting into and out of bed. If it furnishes upper berths,* which common observation and experience teaches are difficult, if not dangerous, to alight from when the car is in rapid motion, it is not carrying its obligation any too far to require it to have steps, as it usually does, or other mechanical contrivances, to assist in that act. And having steps, if they are movable, servants should be employed to bring them to the aid of the passenger, and in the night time such servants should be alert and awake, ready to respond to the ring of the bell provided to call them.²⁷

Sec. 1141. (§ 617j.) Passenger entitled to occupy only the berth he pays for.—The passenger is entitled to occupy only the berth he pays for and which his ticket specifies. This was held in a late case where a man and his wife, not known to the car officials to be such, having bought separate berths, sought to occupy the one paid for by the husband, and were prevented

646, 4 C. C. A. 540, 13 U. S. App. 183, 21 L. R. A. 289.

The berth check furnished a passenger by the conductor of a sleeping-car, so far as it designates a particular berth as the one assigned to the passenger, does not become, as soon as it is furnished to the passenger and received without immediate objection, a written contract as to that subject-matter, the terms of which cannot be varied by parol testimony. There is no necessity of the sleeping-car service for giving a berth check conclusive force as

evidence. *Mann Boudoir Car Co. v. Dupre, supra*. If the sleeping-car company contracts to furnish a berth to the passenger, but breaches the contract before his destination is reached, it will be liable for such breach notwithstanding its having been caused by the failure of the railway company to haul the sleeper. *Pullman Co. v. Hocker*, — Tex. Civ. App. —, 93 S. W. Rep. 1009.

26. *Pullman Co. v. Krauss*, — Ala. —, 40 So. Rep. 398.

27. *Pullman Palace Car Co. v. Fielding*, 62 Ill. App. 577.

by the conductor and porter, who acted in good faith with no other motive than to preserve the decorum of the car.²⁸

Sec. 1142. (§ 617k.) Duty to awaken passengers in time to alight.—When the servants in charge of the sleeping-car have been notified of the passenger's destination, it is their duty to see that the passenger is awakened in time to properly dress and prepare to leave the train.²⁹ "We think," says the court in Texas in one case,³⁰ "that the obligation to awaken and notify the passenger in time for him to prepare to safely and comfortably leave the train at the point of his destination is directly involved in the contract for the use of the sleeping-berth." The company was therefore held liable where the conductor and porter, being asleep, neglected to awaken plaintiff and his wife in time to dress properly, and then hurried them out in the dark and wet at a water-tank half a mile from the station.

As relates to negligence in such cases, the sleeping-car and railroad companies are in *pari delicto*, and either may be held liable, since the agents of the sleeping-car company are the agents of the railroad company.³¹

Sec. 1143. Duty of sleeping-car company to ventilate and heat cars.—It is undoubtedly a fact that sleeping-car companies are bound to warm, heat, and ventilate their cars, but considering the varying predisposition towards heat and cold, and the exacting demands of passengers generally, the exact degree of warmth that is essential cannot be clearly defined,

28. Pullman Car Co. v. Bales (Tex. Civ. App.), 14 S. W. Rep. 855.

29. Airey v. Palace Car Co., 50 La. Ann. 648, 23 So. Rep. 512.

This is especially true as to female passengers who have a right to demand ample time to allow them to clothe themselves in a decent manner before reaching the station. If they are not awakened before reaching the station, the

train should be held a sufficient length of time to enable them to disembark without exposure of their person to the public gaze. McKeon v. Railway Co., 94 Wis. 477, 69 N. W. Rep. 175, 35 L. R. A. 252.

30. Pullman Car Co. v. Smith, 79 Tex. 471, 14 S. W. Rep. 993.

31. Airey v. Palace Car Co., 50 La. Ann. 648, 23 So. Rep. 512.

and may be a difficult matter for the plaintiff to prove on trial. Still that is a matter of proof, and each case must be dealt with on its own facts. It is not a question that can easily be dealt with by demurrer to a declaration.³²

In the more modern cars, the ventilation is usually partly under the control of the occupants of berths. Where that is so, an experienced traveler cannot complain if he neglects to take the usual precautions to open or close the ventilating window, and thereby catches cold.³³ *

Sec. 1144. Duty to keep aisles free from obstructions.—The aisles of the sleeping-car should be kept free from obstructions. Thus, allowing a valise knowingly to stand in the aisle of a dimly lighted sleeping-car where passengers, not knowing the dangerous condition of the passage way, may stumble and fall, is negligence on the part of the company for which it will be liable.³⁴

Sec. 1145. Liability of sleeping-car company for assaults by its servants on passengers or for wrongful expulsion.—A sleeping-car company is bound to provide competent and careful servants, and will be liable for any assaults or violence of its servants not provoked by any wrongful conduct of the passenger.³⁵ In fact, there seems to be no good reason why the sleeping-car company should not be held to the same high degree of accountability for the wrongful and tortious acts of its servants as is exacted of common carriers of passengers and especially of carriers by rail.

So a sleeping-car company will be liable for the proximate results of the wrongful expulsion of a passenger from a berth or its car by its servants. Thus where an unlawful expulsion from the berth of a sleeping-car was the proximate cause of a married woman's miscarriage, the sleeping-car company was

32. *Hughes v. Palace Car Co.*, 74 Fed. 499.

33. *Edmunson v. Pullman Palace Car Co.*, 92 Fed. 824, 34 C. C. A. 382.

34. *Levien v. Webb*, 61 N. Y. Supp. 1113, 30 Misc. 196.

35. *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. Rep. 53.

held liable for such injury although its servants were ignorant of the woman's condition when they expelled her.³⁶

Sec. 1146. Liability of sleeping-car company for baggage in custody of porter while lady passenger is leaving train.—When a lady passenger is about to leave the car after a long journey, and has with her a considerable amount of baggage which it would be burdensome and difficult for her to carry, it is the duty of the porter to assist her by removing such baggage, or as much thereof as she cannot conveniently carry, from the car; and, when any portion or article of such baggage has been taken in charge by the porter, the car company in whose service such porter is engaged becomes responsible therefor—and if, after it has gone into the custody of such servant, such article is lost or stolen, the company is bound by every principle of right and justice to account for its value. Nor is the porter in such case “a mere gratuitous bailee.” The performance of this act is, by the clearest implication, included in the accommodations for which the injured party contracted with and paid the master. To say that such an act is but the result of a private arrangement between the injured party and such servant, for which nothing has been paid, is radically unsound.³⁷

III. PASSENGER CARRIERS BY WATER.

Sec. 1147. (§ 618.) Are subject to general rules regulating other carriers.—The general principles which have been stated in respect to the rights, duties, obligations and liabilities of carriers of passengers apply as well to carriers by water as to carriers by land vehicles, and many of the cases which have been cited as establishing these principles, and for the sake of illustration, have been the cases of passenger carriers by water.³⁸ But, although the law which regulates the rights

36. *Mann Boudoir Co. v. Dupre*, Co., 16 Ind. App. 271, 43 N. E. Rep. 54 Fed. 646, 4 C. C. A. 540, 13 U. 20, 44 N. E. Rep. 1010.
S. App. 183, 21 L. R. A. 289.

38. See various titles under first subdivision of this chapter. As to

37. *Voss v. Wagner Palace Car*

and obligations of the two is in the main precisely the same, the difference in the means and manner of the transportation by them, as well as certain statutory provisions which are of general application in this country, have given rise to some distinctions to which attention must be called.

Sec. 1148. (§ 619.) Statutory regulation.—Reference has already been made to the law of the congress of the United States regulating and limiting the liability of the owners of vessels navigating the sea and our great lakes as carriers of goods and merchandise.³⁹ Many rules for the regulation of ships and steam-vessels engaged in the carriage of passengers upon the ocean and upon our lakes and rivers, with a view to securing the greater safety of such passengers, have also been prescribed by the same legislative authority. Provision is made for the appointment by the federal government of a supervising inspector-general, supervising inspectors and local inspectors for certain designated districts, of steam-vessels navigating any of the waters of the United States which are common highways of commerce, or are open to general or competitive commerce, excepting the public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam, designed for the navigation of canals; whose duty it shall be to establish such regulations, to be observed by all such steam-vessels in passing each other, as they shall from time to time deem necessary for safety, for the violation of which, when thus established, certain penalties are provided; to inspect annually the hulls and boilers of such vessels, and satisfy themselves that every such vessel is of a structure suitable for the service in which she is employed, has suitable accommodations for passengers and crew, and is in a condition to warrant the belief that she may be used in navigation as a steamer with safety to life, and that all the require-

liability for not lighting and v. Navigation Co., 14 N. Y. Suppl. guarding hatchways, see *The Furnessia*, 35 Fed. Rep. 798; *The Pilot Boy*, 23 Fed. Rep. 103; for leaving rudder-chains exposed; *Garoni* 39. *Ante*, § 344.

ments of law in regard to fires, boats, pumps, hose, life-preservers, floats, anchors, cables and other things, are faithfully complied with; and shall satisfy themselves, by subjecting all boilers to hydrostatic pressure and by thorough examination, that the boilers are well made, of good and suitable material, and that their construction is complete as to openings for the passage of water and steam, as to the dimensions and freedom from obstruction of all pipes and tubes, as to safety-valves, etc., so that all such boilers and machinery and the appurtenances are such as may be safely employed in the service proposed for them, without peril to life; and that when the inspectors approve the vessel and her equipments throughout, they shall make and subscribe, under oath, a certificate to that effect, two copies of which shall be placed by the master or owner of the vessel in conspicuous places thereon.⁴⁰

Sec. 1149. (§ 620.) Penalties imposed for dangerous practices.—Penalties are also provided by the act for the carriage of gunpowder upon such vessels employed in the transportation of passengers, without a certificate from such inspectors authorizing it; for the improper or fraudulent construction of boilers; for subjecting such boilers to a greater pressure of

40. Congress, in the exercise of its power to regulate commerce among the states, passed an act in 1838 to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, which included provisions for the inspection, by officers appointed for that purpose, of the boilers and machinery of such vessels. 5 Stat. at Large, 304. It was made the duty of owners of steam vessels to cause such inspection to be made, and licenses were granted only after obtaining the inspector's certificate. The system of government supervision over steam vessels initiated by this act was

greatly expanded by subsequent legislation in furtherance of the same policy, and especially by the amendment of 1852 (10 Stat. at Large, 61); and in February, 1871, an act was passed covering the whole subject. 16 Stat. at Large, 440; R. S. Tit. LII, chs. 1, 2 §§ 4399-4500.

Subsequent amendments have only enlarged the scope of the act as new conditions arose from time to time demanding legislation. All the amendments have been in the direction of greater protection for the passenger. See, U. S. Compiled Statutes, pages 3014 to 3028 inclusive.

steam than is allowed by the act or fixed by the inspectors, or for intentionally loading or obstructing, in any way or manner, the safety-valve of a boiler, so as to subject it to a greater pressure of steam than the amount allowed by the certificate of the inspectors, or for intentionally hindering the operation of any machinery or device employed to denote the state of the water or steam in any boiler, or to give warning of any approaching danger, or for intentionally permitting the water therein to fall below the prescribed low-water line of the boiler.⁴¹

Sec. 1150. (§ 621.) Licensing officers, etc.—It is also enacted that such inspectors shall license and classify the masters, mates, engineers and pilots of all steam vessels, and that it shall be unlawful for any vessel to employ any person or for any person to serve as a master, chief mate, engineer or pilot on any steamer who is not so licensed; and that when certificates of license are so obtained they shall also be placed by the persons receiving them in conspicuous places upon the vessels upon which they may be employed. Provision is also made for the revocation of such licenses for negligence, misbehavior, unskilfulness or the wilful violation of any of the provisions of the act, and for the re-inspection of such steamers as often as the inspectors may consider it proper or necessary, and for the making of such repairs by the master or owners as the inspectors may direct.⁴²

Sec. 1151. (§ 622.) Statutory regulations for safety.—Regulations are also made by the same law-making power providing that no steamer shall depart from any port without a full complement of licensed officers and crew; limiting the number of passengers according to the accommodations of such vessels; for keeping a correct list of all passengers received and delivered from day to day; for precautions against fire; prohib-

41. U. S. Compiled Statutes, pages 3034 to 3041 inclusive. On § 4499, see *The Idaho*, 20 pages 3028 to 3034 inclusive.

42. R. S. of U. S., Tit. LII, ch. 1, Fed. Rep. 187; on § 4466, see *The Pope Catlin*, 31 Fed. Rep. 408.

iting the transportation upon any steamer carrying passengers of inflammable or dangerous goods except upon certain conditions; for keeping watchmen during the night-time, in the cabin and on deck, to guard against fire and other dangers, and to give the alarm in case of accident or disaster; for a proper supply of life-preservers for every cabin passenger for which the vessel may have accommodation; for stairways and gangways to facilitate the escape of both cabin and deck passengers in case of the sinking of the vessel or other accident endangering life; for keeping life-boats of such dimensions and arrangements as the board of supervising inspectors may prescribe to be carried in the most convenient manner for immediate use in case of accident; as to all which requirements, and the manner of complying with them, as well as the penalties for their neglect, the duties of such carriers are laid down with great detail. And it is further provided that whenever damage is sustained by any passenger or his baggage from fire, collision, explosion or other cause, the master and owner of such vessel, or either of them, and the vessel itself, shall be liable to such person so injured to the full amount of the damage, if it happens through any neglect or failure to comply with the provisions of the act, or through known defects or imperfections of the steaming apparatus or of the hull of such vessel;⁴³ and that any person sustaining loss or injury through the carelessness, negligence or wilful misconduct of any master, mate, engineer or pilot, or his neglect or refusal to obey the laws governing the navigation of such steamers, may sue such master, mate, engineer or pilot and recover damages for any such injury caused by him.⁴⁴

43. This provision of the act imposing liability upon the owner of the vessel and upon the vessel itself to the full amount of the damage sustained by the passenger (sec. 4493) is not confined to cases in which he is chargeable with personal default or neglect to comply with the act, but extends also to cases where the injury or damage is caused solely by the neglect of the master or other persons employed upon the vessel; and is not inconsistent with the act of 1851, limiting the liability of such owners. *Carroll v. The Railroad*, 58 N. Y. 126.

44. R. S. of U. S., Tit. LII, ch.

Sec. 1152. (§ 623.) Government of merchant vessels.—Laws have also been passed by congress making specific regulations for the government of merchant vessels, owned in whole or in part by citizens of the United States, in the transportation of passengers, including emigrants, from foreign ports or places, other than those belonging to foreign contiguous territory, to any port or place within the United States, or from a port within the jurisdiction of the United States to a foreign port, or from a port on the Pacific coast to one upon the Atlantic coast of the United States, or from a port of the United States upon the Atlantic coast to a port upon the Pacific, or, when the vessel is registered, enrolled or licensed within the United States, from a port in one foreign country to another foreign port. These regulations prescribe the number of passengers which any such vessel may carry, proportioned to its tonnage, and the space upon such vessel to be appropriated to the use of each passenger, and which shall not be occupied by stores or other goods, not the personal baggage of such passenger. They also provide for lockers and hospitals; for the manner of the construction of berths; for ventilation; for the supply of provisions and water for the use of passengers upon the voyage; for the cooking and distribution of food and provisions among the passengers at regular and stated hours, by messes, or in such other manner as shall be deemed best and most conducive to their health and comfort; and confer authority upon the master to maintain good discipline, and such habits of cleanliness among passengers as will tend to the preservation and promotion of health, and, for those purposes, to adopt such regulations as he may think proper; for the violation or neglect of any of which provisions the appropriate penalties were provided by the act.¹

2, §§ 4463-4500; U. S. Compiled Statutes, pages 3044 to 3059 inclusive.

On § 4472, see *Egan v. Steamboat Co.*, 86 Hun, 542, 33 N. Y. Supp. 791.

On § 4465, see *Hughson v. Steamboat Co.*, 181 Mass. 325, 64

N. E. Rep. 74, 58 L. R. A. 432, holding that a ticket holder has no right of action for being left behind as a result of the U. S. inspector refusing to allow the vessel to receive any more passengers.

1. R. S. of U. S. Tit. XLVIII, ch. 6, §§ 4252-4277; U. S. Compiled

Sec. 1153. (§ 624.) Regulations to prevent collisions.

Rules have also been prescribed by law for the prevention of collisions between sailing vessels and steam vessels, whenever approaching each other in such manner as to involve the danger of collision, or when, in a fog or in thick weather, they may not be seen by each other, and there may be consequently danger of collision when one may be stationary and the other in motion.²

Sec. 1154. (§ 625.) Purpose of these regulations.—These legislative enactments, of which the foregoing is a very brief summary, intended merely to indicate their character, have been framed with great particularity, with the view, as far as it can be done by statutory regulations, of protecting the lives of passengers upon water, and of securing for them the accommodations necessary for their comfort upon long voyages. The provisions of the law, however, in regard to the inspection of such vessels, being intended solely to secure the safety of the passengers, have been extended so as to require the inspection of the hulls and boilers of ferry-boats, yachts and other small craft of like character, as well as of tug boats, towing boats and freight boats, all of which are also required to be navigated by a licensed engineer and a licensed pilot.

Sec. 1155. (§ 626.) These regulations do not lessen liability of carrier for safe carriage of passengers.—These acts are not intended to, nor do they, in anywise lessen the responsibil-

Statutes, pages 2930 to 2936 inclusive.

Although the certificate of a U. S. marine inspector permitting a vessel to carry more passengers than she actually carried may relieve her against the statutory penalty for carrying an excessive number of passengers, it does not relieve her from liability to the passengers if any damage to them is occasioned thereby. *Pacific Steam Whaling Co. v. Grismore,*

117 Fed. 68, 54 C. C. A. 454, *affirming* *The Valencia*, 110 Fed. 221.

2. R. S. of U. S., Tit. XLVIII, ch. 5, §§ 4233-4251; U. S. Compiled Statutes, pages 2863 to 2903 inclusive.

Non-compliance with the statute makes a *prima facie* case of negligence. *Schloterer v. Ferry Co.*, 78 N. Y. Supp. 202, 75 App. Div. 330.

ity of the carrier of passengers by steam vessels, for the care and diligence in providing for the safety and comfort of such passengers which are required upon the general principles of the common law, according to which carriers by water as well as by land are bound, "as far as human care and foresight will go" to provide for the safety of their passengers. They are intended as additional safeguards for the protection of passengers on steamboats and steam vessels of every kind, without in any manner interfering with or affecting the obligation of the carrier to the passenger; and the liability of the owners of such vessels is not restricted nor confined to the acts of omission or commission for which penalties are provided, nor will the strictest compliance with every provision of the act in regard to the inspection of his vessel and its machinery, nor the certificate from the inspectors of their fulfilling in every respect the requirements of the act relating thereto, create any presumption in the carrier's favor when the question of his negligence is involved. He cannot screen himself behind the provisions of the law showing that he has complied with them, and the question of his liability to the passenger will be determined independently of them and as though they had never been enacted. The presumption of negligence, for instance, arising from the explosion of a boiler will not depend upon evidence of a non-compliance with the act providing for its inspection, but upon the rule of common law that where an act takes place which usually, and according to the ordinary course of events, would not happen if proper care was exercised, it will be presumed that such care was not observed; nor, on the other hand, would any presumption of the observance of due care arise from evidence of a strict conformity with the law, but, on the contrary, if such evidence be admissible, its effect would be to strengthen the probability of negligence.³

Sec. 1156. (§ 627.) Duty to furnish passengers with food and other necessities.—It not being the usage of carriers of

3. *Caldwell v. The Steamboat* Cush. 539; *Simmons v. The Steamboat Co.*, 47 N. Y. 282; s. c. 56 Barb. *boat Co.*, 97 Mass. 361, 425; *Bradley v. The Railroad*, 2

passengers by water, other than deck or steerage passengers, to require that the passenger shall furnish his own provisions or sleeping accommodations, but it being, on the contrary, the universal custom of such carriers to provide for the passenger these necessities, when the length of the voyage makes them indispensable, it is implied as a part of the contract of carriage in such cases, in the absence of express stipulations upon the subject, that the carrier will supply the passenger with such food and other accommodations as will be necessary for his health and comfort upon the voyage and as may be usual and customary upon such vessels and upon such voyages; and if the carrier, under such circumstances, should so far fail in his duty in this respect as to cause suffering or sickness, or serious grievance of any kind to the passenger, he would be liable to an action for the breach of his contract.⁴ If the passenger, however, with full knowledge of all the circumstances, voluntarily accepts poorer accommodations rather than not to be able to make the journey at all, the carrier will not be liable for any damages to the passenger resulting from the poorer accommodations.⁵

4. *The Oregon*, 133 Fed. 609, 68 C. C. A. 603; *The European*, 120 Fed. 776, 57 C. C. A. 140 (improper food); *The D. C. Murray*, 89 Fed. 508 (inferior food); *Defrier v. The Nicaragua*, 81 Fed. 745 (insufficient food).

The responsibility of furnishing food as imposed by Passenger Act of 1882 (22 St. at Large, 186) cannot be evaded by charter contract. *The Prinz Georg*, 23 Fed. Rep. 906.

The carrier is liable for not furnishing food and accommodation as stipulated on the ticket. *O'Carroll v. The Havre*, 45 Fed. Rep. 764.

Passengers who purchase second class tickets are entitled to second class accommodations, and if they are furnished badly venti-

lated and noisome steerage accommodations and poor and improper food, they may recover in damages from the owner of the vessel for breach of contract. *Pacific Whaling Co. v. Grismore*, 117 Fed. 68, 54 C. C. A. 454, *affirming The Valencia*, 110 Fed. 221.

A carrier by water cannot exact a charge for the use of a stateroom and then by means of a regulation printed on the ticket deprive the passenger of the use of it. If the passenger fails to comply with the regulations printed on the ticket, and the stateroom is resold, he must be given another room or his money must be refunded. *Clark v. Railroad Co.*, 83 N. Y. Supp. 162, 40 Misc. Rep. 691.

5. It being at the close of a

Sec. 1157. (§ 628.) Same subject.—In the case of *Young v. Fewson*,⁶ in which the declaration averred that, in consideration of a certain sum paid by the plaintiff to the defendant, it was the defendant's duty to furnish him with good and fresh provisions on a voyage, and that he did not do so, Lord Denman, in summing up, told the jury that it was the duty of the defendant, as master of the vessel, to supply good and fresh provisions for the plaintiff, and that if he did not provide such supply, then the question would be whether the plaintiff had been in any degree a sufferer by the captain's neglect. "I think," said he, "the result of the whole is, that the captain did not supply so large a quantity of good and fresh provisions as is usual under such circumstances. But there is no real ground of complaint, no right of action, unless the plaintiff has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had, that he is therefore to have a right of action against the captain who does not provide all that he ought. You must be satisfied that there was a real grievance sustained by the plaintiff." There was, however, a verdict for the plaintiff. And where a passenger filed a libel *in rem* against the ship, alleging that he had not been furnished with provisions and water on his passage from Liverpool to New York, there was a decree for the libelant, the court (Nelson, J.) holding that it was a part of a passenger's contract that they should be furnished, and that the vessel was liable for a breach of such contract in the same manner as for a breach of a contract of affreightment of merchandise.⁷

Sec. 1158. Same subject—Steerage passengers.—In the absence of a binding usage to the contrary, or special contract

summer season, a boat was overcrowded. Not having reserved berths for himself and party, deceased, nevertheless, insisted on going. The officers of the boat finally offered to take him if he would accept a cot or mattress. He accepted the offer, contracted pneumonia, and died. The carrier was held not liable because, with

full knowledge of all the circumstances, deceased had assumed the risk of sleeping on the mattress. *Van Anda v. Navigation Co.*, 111 Fed. 765, 49 C. C. A. 596, 55 L. R. A. 544.

6. 8 Carr. & P. 55.

See also, *The President*, 92 Fed. 673.

7. *The Aberfoyle*, 1 Blatch. 360.

with the carrier, steerage passengers are not entitled to be furnished bedding.⁸ And although a steerage passenger may have some cause to complain because dogs are carried in the steerage cabin, still this does not constitute such a breach of the carrier's contract for passage as to entitle him to substantial damages.⁹

Sec. 1159. (§ 629.) Authority of master.—The master of a ship must, from necessity, be justified in emergencies in assuming and exercising a more despotic power over both the passengers and the crew of his vessel than could ever become necessary in the case of carriers by land. He is a *quasi* magistrate on board his ship at sea, and may, within certain limits, enforce and justify orders which in port would expose him to censure, to civil responsibility and to punishment.¹⁰ His ship may be placed in situations of extreme peril from tempests, from mutiny, or from exposure to capture by an enemy or by pirates, when the preservation of all on board, and of the ship itself, may depend upon implicit obedience to his orders, not only by the crew of the ship but by the passengers themselves. In such perilous situations, obedience to his authority is a duty incumbent upon every passenger, and in times of such extraordinary danger he may be called upon to render any service which may be required by the master and which it may be in his power to perform, although it may expose him to danger. He may be required, for instance, to work at the pumps with the crew if his assistance in that way may be deemed necessary to save the ship and the lives of those on board, or he may be required to resist the attack of an enemy upon the ship, though it may expose him to great personal danger.

Sec. 1160. (§ 630.) Same subject.—But while the master may lawfully require whatever is necessary for the security of the vessel, the discipline of the crew, or the safety of all on board, not only of the ship's company, who are bound at all

8. The Centennial, 131 Fed. 816;
Defrier v. The Nicaragua, 81 Fed.
745.

9. The Centennial, *supra*.
10. Block v. Bannerman, 10 La.
Ann. 1.

times to obey him, but also of those who stand in the relation of passengers to the ship, the exercise of this power must, at the master's peril, be restricted by the necessity of the case; and while, on the ground of such necessity, he may enforce and justify orders and a course of conduct towards the passengers which would, under ordinary circumstances, be regarded as in the highest degree tyrannical, he can, even in times of danger, require no more exertion*or exposure on the part of the passenger than is strictly necessary; and if he subject him to danger, or to a severity of treatment which the emergency did not justify, he will be liable to the passenger in an action for damages.¹¹

Sec. 1161. (§ 631.) Duty of master to provide for safety, health and comfort of passengers.—On the other hand, it is the duty of the master of the vessel to attend to the preservation of the health and to the comfort of the crew and passengers, as well as to the safety of the vessel and cargo. In respect to passengers, the duty of the master is one of peculiar responsibility and delicacy, and a stipulation in their contract with him is always implied that the treatment which they shall receive, not only from him but from all those under his authority, shall be respectful; and he would fail in his duty to them if he did not himself observe in his conduct towards them those rules of civility and politeness so essential to the comfort of those confined on shipboard, and also enforce their observance by all those in the ship's employment. And when in a case before Story, J., before referred to, it was urged that while a failure in this regard by the master of the vessel might be a breach of good manners, or an offense against strict morality, it was not a breach of duty of which the law could take cognizance or punish, it was replied that the law involved no such absurdity, and the judgment of the court was that the contract of the

11. *Boyce v. Bayleffe*, 1 Camp. 58; *Keene v. Lizardi*, 5 La. 431; 3 Kent's Com. 160, n. *Master may require passenger ill with contagious disease to be kept separated from other passengers. The Hammonia*, 10 Bene. 512.

passengers with the master was not "for mere ship-room and personal existence on board, but for reasonable food, comforts, necessities and kindness. It is a stipulation not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females it proceeds yet further; it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors, by the excitement of terror and cool malignancy of conduct, to inflict torture upon susceptible minds."¹² Where, therefore, while a vessel was lying in a foreign port, a seaman, in the night-time, entered the state-room of a female passenger, attempted a rape, and behaved with indecency in her presence, and, upon complaint to the master, he was immediately discharged and put ashore, it was held to be a just and legal ground for the discharge of the seaman.¹³ And in a case where the facts were that a passenger and the clerk of a steamer had a slight altercation about the payment of passage money, the passenger declining to pay unless the clerk would make change of a bank-note which the passenger offered, and some time afterwards the clerk made an assault upon him whilst sitting quietly in the saloon of the boat, and treated him with great indignity and outrage, it was held that the vessel and its owners were liable to the libellant in damages for such treatment by the clerk, it being a gross violation of the duty of respectful behavior due from the carrier to his passenger.¹⁴

So in bad weather, it is the duty of the master to keep the passengers under deck; and if he requires them during such weather to go on deck for food when the vessel is pitching and throwing water over the deck, the owners will be liable for an

12. *Chamberlain v. Chandier*, 3
Mason, 242.

14. *Pendleton v. Kinsley*, 3 Cliff.
416.

13. *Nieto v. Clark*, 1 Cliff. 145.

injury to a passenger caused by his being thrown down by a wave.¹⁵

Sec. 1162. (§ 632.) Same subject—Duty in respect of women and children.—Indeed, as to minors and female passengers, it has been said that the master stands, upon a voyage, *in loco parentis* to them, such passengers being comparatively helpless, and liable to imposition and mistreatment. And upon this principle, where the master of a coasting steamer suffered a notorious gambler, a passenger on his vessel, to decoy a minor, also a passenger, into playing upon a “sweat cloth,” by which the latter lost a large sum of money belonging to his widowed mother, it was held that the master was liable in a suit in admiralty by the mother for the whole amount of the money so lost, with interest.¹⁶

Sec. 1163. (§ 632a.) Same subject—Duty to aid sick or disabled passengers.—So where, from sickness or accident upon the voyage, the passenger becomes unable to properly provide or protect himself, it is the duty of the carrier to extend such aid and protection as the passenger’s condition may require. It was so held where the passenger was a woman upon a steamship. During the night the berth above hers fell, owing to its faulty construction; the woman in the berth below, thinking that the ship was sinking, became so paralyzed with fear as to be unable to move or stand alone; being removed from her berth and left to stand without aid, she was thrown violently down by the rolling of the ship, and the carrier was held liable for not providing for her safety.¹⁷

But the errors, mistakes, or negligence of a ship’s doctor in caring for sick passengers are not imputable to the ship where

15. The Prinzess Irene, 139 Fed. 810.

16. Smith v. Wilson, 31 How. Pr. 272.

17. Smith v. Packet Co., 86 N. Y. 408, citing Sheridan v. Railroad Co., 36 N. Y. 39.

Whether the carrier is bound to furnish a surgeon, *quaere*; but if bound, by law or contract, must use reasonable care and diligence in his selection. Laubheim v. Steamship Co., 107 N. Y. 228.

it is not shown that the ship's owners were negligent in selecting him.¹⁸

Sec. 1164. (§ 633.) Passenger must conduct himself properly.—But the treatment of the passenger due from the master and those under his command may depend in a great degree upon the passenger's conduct during the voyage. If he conducts himself in a manner calculated to weaken the due authority of the master or officers, or interferes with the management of the vessel, or exposes his fellow-passengers, or any person on board, to annoyance or unnecessary inconvenience, the master may coerce him into better behavior, or remove him from the society of those whom he annoys. But he must not interfere to this extent with his passengers on slight grounds, but only where grave reasons for so doing exist, and then he must go no further than is necessary to the proper discipline of the ship, and to secure the comfort of other passengers. Where the complaint was that the plaintiff had been excluded from the cuddy of the ship and from certain parts of the deck, and the justification pleaded was that the plaintiff had been guilty of ungentlemanly conduct, Tindall, C. J., charged the jury that "it would be difficult to say, if it rested here, in what degree want of polish would, in point of law, warrant a captain in excluding a passenger from the cuddy. Conduct unbecoming a gentleman, in the strict sense of the word, might justify him; but in this case there is no imputation of the want of gentlemanly principle. . . . The third ground is the threat used by the plaintiff that he would cane the defendant. . . . It is important to consider this, as, if it did operate on the mind of the defendant at the time of the exclusion, I cannot conceive that such conduct would not justify that exclusion. A man who had threatened the commanding officer of the ship with person-

18. *The Napolitan Prince*, 134 Steamship Co., 132 N. Y. 91, 30 Fed. 159; *O'Brein v. Steamship* N. E. Rep. 482, 28 Am. St. Rep. Co., 154 Mass. 372, 28 N. E. Rep. 556, 15 L. R. A. 166, reversing 266, 13 L. R. A. 329; *Allan v.* 55 Hun, 611, 8 N. Y. Supp. 803.

al violence would not be a fit person to remain at the table at which he presided.'¹⁹

Sec. 1165. Duty to furnish berths.—If a berth is a reasonable and proper accommodation on a steamship, the carrier will be liable if it fails to inform the passenger when he purchases his ticket that all the berths for that trip are disposed of.²⁰ The carrier must also serve the public without discrimination and sell its tickets and accommodations in the order of application. Thus if it refuses one passenger a berth on a steamship, and later furnishes a berth to another, it will be liable to such passenger for any resulting damage.²¹

Sec. 1166. (§ 634.) How far carrier by water bound by schedule as to leaving.—How far the advertisements of the carrier, as to his time of departure upon the contemplated journey, amount to contracts between him and the passenger in land carriages, and how far he can be made liable for a non-compliance with his public undertaking in this respect, has been already noticed.²² In respect to the delay in its departure by a ship upon a contemplated voyage after the time at which it was advertised to sail, or at which it was to sail according to its contract with the passenger, it has been held that any material delay, especially if it can be shown that time was regarded as an essential part of the contract, will subject the ship and its owners to a liability for damages at the suit of the aggrieved party.²³

Sec. 1167. Same subject—Carrier by water not bound to deliver telegrams addressed to passengers.—In the absence of

19. *Prendergast v. Compton*, 8 Exch. 395; *Cobb v. Howard*, 3 Car. & P. 454; *Noden v. Johnson*, Blatch. 524; *Yates v. Duff*, 5 Car. 16 Q. B. 218, 2 Eng. L. & Eq. 201. & P. 369. Where the ticket expressly states that the voyage shall be direct, and a material deviation is made, the passenger is entitled to damages for the delay and at least for the price of the ticket. *De Colange v. The Marquax*, 37 Fed. Rep. 157.

20. *Patterson v. Steamship Co.*, — N. Car. —, 53 S. E. Rep. 224.

21. *Patterson v. Steamship Co.*, *supra*.

22. *Ante*, §§ 1104-1107.

23. *Cranston v. Marshall*, 5

any evidence tending to show that it is a part of the business habit or custom of a carrier of passengers by water to receive telegrams for delivery to its passengers, or that it knew or permitted this to be done by its officers, servants or agents, the carrier is not liable for the non-delivery of a telegram addressed to a passenger on board its steamer and by direction of the captain accepted by the purser for delivery. The court will not, as a matter of law, charge the owner with the duty of delivering telegrams addressed to passengers.²⁴

Sec. 1168. Passengers may refuse to be carried in unseaworthy ship.—In every contract for the transportation of passengers by water, there is an implied warranty on the part of the owner that the vessel is seaworthy, or that she will be made seaworthy before proceeding upon the voyage; and it is the duty of the owners of the ship to make all necessary repairs, and remedy all known defects in the construction of the vessel, so that her appearance will inspire confidence in those who make inquiries as to her condition. Failure to make necessary repairs, or to remedy known defects in the construction or equipment of a ship before proceeding upon a voyage, constitutes a breach of the carrier's contract with his passengers; and passengers have a right when there has been such breach of contract to refuse to go in her and to recover damages as for any other breach of contract.²⁵

Sec. 1169. Liability of carrier by water continues until passenger and his baggage are safely landed.—Landing is a part of the contract with a passenger, and a carrier by boat will be liable in damages either for a negligent injury to the passenger or his baggage during the transfer,²⁶ or for a negligent failure to land the passenger or his baggage at destination.²⁷ Nor is

24. *Davies v. Steamboat Co.*, 94 Me. 379, 47 Atl. Rep. 896, 53 L. R. A. 239.

25. *The Guardian*, 89 Fed. 998.

26. *In Le Blanc v. Sweet*, 107 La. 355, 31 So. Rep. 766, a carrier

by water was held guilty of negligence in attempting to transfer an inexperienced female passenger

from a boat to a skiff in mid-stream without stopping the boat

27. *Pacific Steam Whaling Co. v.*

the carrier relieved from liability for his failure to land baggage by reason of language in the contract that the landing should not be deemed a part of the voyage.²⁸ So a custom in regard to the landing of passengers or their baggage, in order to be upheld by the courts, must be reasonable in its nature.²⁹

When passengers contract to be carried to a port where they are to procure boats to land themselves and stores, they must be given a reasonable length of time to disembark with their stores, and the non-performance of such an agreement can only be excused by the "act of God," the "public enemies," or the "public authority."³⁰

To excuse the non-performance of a contract to carry a passenger on the ground of an act of God, it must appear that the carrier was chargeable with no want of diligence or was in no respect negligent. Thus, the fact that a voyage in the fall of the year was prevented by low water will not excuse the carrier from his contract with a passenger on the ground of an act of God, unless he can show that such a stage of the water was utterly unforeseen and wholly unexampled. The fact that it was near a season of the year when low water usually prevailed would charge the carrier with notice.³¹ So a carrier by water has been held liable for its failure to land a passenger at destination where the bay at the passenger's destination was ice-bound and impossible of access, the court regarding it as the carrier's duty to have informed himself of that fact before accepting the passenger.³²

Grismore, 117 Fed. 68, 54 C. C. A. 454, *affirming* The Valencia, 110 Fed. 221; *Smith v. Transportation Co.*, 20 Wash. 580, 56 Pac. Rep. 372, 44 L. R. A. 557.

28. *Pacific Steam Whaling Co. v. Grismore*, *supra*.

29. *Pacific Steam Whaling Co. v. Grismore*, *supra*.

30. The measure of damages for failure so to do is the actual damage sustained, which includes the fare paid; and, where the passen-

ger returns to the port at which he took passage, the cost of such return, together with a reasonable compensation for the loss of time necessarily resulting from the breach of contract. *The President*, 92 Fed. 673.

31. *Smith v. Transportation Co.*, 20 Wash. 580, 56 Pac. Rep. 372, 44 L. R. A. 557.

32. *Bullock v. Steamship Co.*, 30 Wash. 448, 70 Pac. Rep. 1106.

But when the master of a vessel contracts to carry a passenger to and land him at the mouth of a river, or as near thereto as he can with safety to his vessel, it is for the master to determine how near to the mouth of the river he can approach and make a landing.³³

33. *Torrey v. Kelly*, 121 Fed. 542, 57 C. C. A. 604.

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